Supreme Court, U.S.
FILED
941351 DEC 2 8 1994
OFFICE OF THE CLERK

No. .

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROBERT STANTON WERNER,

PETITIONER.

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

R. EDWIN BROWN*
LAURIE R. HANIG
BROWN AND STURM
260 East Jefferson Street
Rockville, Maryland 20850
(301) 762-2555
Attorneys for Petitioner
* Counsel of Record

88pp

PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Do fundamental and established principles of due process which attach to a court/jury proceeding, i.e. the right to be heard before a decision is rendered, the right to a requested instruction on law not included in the instructions proposed, and the right to a new fact-finding tribunal which is not tainted by knowledge of the reversed award of the previous one, also apply to a land commission proceeding?

Table of Contents

Question Presented. i
Table of Contents ii
Table of Authorities iii
Opinions Below 1
Statement of Jurisdiction. 2
Constitutional Provisions and Federal Rule of Civil Procedure 2
Statement of the Case 3
Reasons for Granting the Writ. 8
Conclusion 17
Appendix. 1a
Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit dated 9/19/94 . . . . . 1a
Order dated 4/14/93 . . . . . 42a
Report of the Commission 47a
Order dated 7/10/91 . . . . . 60a
Order dated 7/11/91 . . . . . 62a
Order dated 8/30/91 . . . . . 65a

Table of Authorities

Cases

Boddie v. Connecticut, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.E.2d 113, 118 (1971) 16

Cade v. United States, 213 F.2d 138 (4th Cir. 1954) 12, 14

Carvel Corp. v. Diversified Management Group, Inc., 930 F.2d 28, 230, 232 (2d Cir. 1991) 15

Kansas City v. Peret, 574 S.W.2d 443, at 444 (Mo. 1978) 10

Merchants Co. v. Hutchinson, 199 So.2d 813, at 816 (Miss. 1967 11

Missouri Pac. Ry. Co. v. Roberts, 187 Mo. 309, 86 S.W. 91, 94(1905) 10

National Fire Insurance Co. v. Housing Development Co., 827 F.2 1475 (11th Cir. 1987) 15

State ex rel State Highway Commission v. Artz, 45 S.W.2d 81, 2 (Mo. 1932) 11

United States v. 125.07 Acres of Land, 667 F.2d 243, 252 (1st Cir. 1981) 13

United States v. 320.0 Acres of Land, 605 F.2d 762, 817 n.124(5th Cir.1979) 13, 16, 17

United States v. 68.94 Acres of Land, 918 F.2d 389, 393 (3d Cir1990) 12

United States v. 74.60 Acres of Land, 358 F.2d 143 (7th Cir.1966) 15

United States v. 97.19 Acres of Land, 582 F.2d 878 (4th Cir. 978) 12

United States v. Merz, 376 U.S. 192, 198, 84 S.Ct. 639, 11 L.d.2d 629, 634 (1964) 9, 10, 15, 16

United States v. Werner, 916 F.2d 175, 179 (4th Cir. 1990) 3, 18

United States v. Wise, 131 F.2d 851 (4th Cir. 1942) 12

Rules and Regulations

Federal Rule of Civil Procedure 71A(h) 2, 9

Statutes

16 U.S.C. §1241 3

16 U.S.C. §§ 4601-4604 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 3

40 U.S.C. § 257 3

40 U.S.C. § 258a 3

(CAPTION)

The Petitioner, Robert Stanton Werner, respectfully prays that a writ of certiorari issue to review the September 19, 1994, decision and judgment of the United States Court of Appeals for the Fourth Circuit and the October 13, 1994, denial of his Petition for Rehearing in the above-captioned proceeding.

OPINIONS BELOW

The published opinion and judgment of the United States Court of Appeals for the Fourth Circuit, which reversed the judgment entered upon the award rendered by the first land commission and ordered a new determination of just compensation, is reported at 916 F.2d 175 (4th Cir. 1990).

The September 19, 1994, opinion and judgment of the United States Court of Appeals for the Fourth Circuit, in the current appeal, is unreported and is reprinted in the Appendix at App. 1.

The April 14, 1993, opinion and judgment of the United States District Court for the Northern District of West Virginia, adopting the report and award of the second land commission, is unreported and is reprinted in the Appendix at App. 42a.

The October 17, 1991, report and recommendation of the second land commission, adopted by the United States District Court for the Northern District of West Virginia, is unreported and is reprinted in the Appendix at App. 47a.

The July 10, 1991, Court Order of the United States District Court for the Northern District of West Virginia denying the landowner's proposed general and supplementary instructions is unreported and is reprinted in the Appendix at App. 60a. The July 11, 1991, Court

Order of the United States District Court for the Northern District of West Virginia, appointing the second landcommission and informing each commissioner of the tainted award of the first land commission, is unreported and is reprinted in the Appendix at App. 62a.

The August 30, 1991, Court Order of the United States District Court for the Northern District of West Virginia, denying the landowner's motion for a cautionary instruction to cure the error in advising the new land commissioners of the tainted award reached by the first land commission, is unreported and is reprinted in the Appendix at App. 65a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the United States Court of Appeals for the Fourth Circuit of September 19, 1994. Petitioner's subsequent Petition for Rehearing was denied on October 13, 1994. The United States Supreme Court has jurisdiction to review cases from the courts of appeals by virtue of *28 U.S.C. § 1254(1)*.

CONSTITUTIONAL PROVISIONS AND FEDERAL RULE OF PROCEDURE INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part that "no person... shall be deprived of... property without due process of law," and that "private property [shall not] be taken for public use, without just compensation."

Federal Rule of Civil Procedure 71A(h) provides:

> Before appointing the members of the commission and alternates, the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee.... Each party shall have the right to object for valid cause to the

appointment of any person as a commissioner or alternate.

STATEMENT OF THE CASE

The United States National Park Service filed an eminent domain proceeding taking immediate possession of 175.76 acres in Harpers Ferry, West Virginia, owned by Robert S.Werner, on February 5, 1980, under *40 U.S.C. § 257, 40 U.S.C. § 258a, 16 U.S.C. §§ 4601-4604, and 16 U.S.C. §1241*. Nearly three years later, on October 6, 1982, the court appointed the first land commission. The land commission hearing took place in late June and early July 1984; the report was filed nearly one year later, on June 12, 1985. Although the land commission hearing transcripts were filed with the court in February, 1986, the landowner's timely filed objections were not heard and ruled upon for nearly three more years. In November 1988, an Order issued affirming the first land commission award and entering final judgment as to just compensation of $263,640. A final Order was entered on June 26, 1989, disposing of further motions pertaining to interest. The United States Court of Appeals for the Fourth Circuit, on appeal pursuant to *28 U.S.C. § 1291*, reversed and ordered "a new determination of just compensation," based upon the District Court's refusal to replace a biased land commissioner. *United States v. Werner*, 916 F.2d 175, 179 (4th Cir. 1990).

On November 18, 1990, the District Court issued a Notice of Proposed Land Commissioners. The landowner, after examination, posed no objections to the proposed commissioners. The landowner submitted proposed general instructions, including one on severance damages and competence of the landowner to testify to the value of his property, and requested a specific supplemental instruction

on valuation of unique property by the "bands of value" method. The landowner provided the court with a detailed analysis of the legal defects and omissions in the instructions which were previously given, as compared to the landowner's proposed instructions. The landowner objected that the prior instructions gave no instruction at all on severance damages, on valuation of unique property by the "band of value" method when there is no comparable market data, and on the competence of the landowner to provide an opinionon the value of his property. The landowner also asserted that one instruction on the unit rule pertaining to valuation methodology was misleading and inadequate under the testimony to be presented, particularly with respect to the "bands of value" method to be used by the landowner and his primary appraiser.

The District Court denied the landowner's objections to the prior instructions and request for new and supplemental instructions, and stated that "the prior instructions in no way prohibit the presentation of the issues contained in Defendants' proposed instructions." The landowner, pursuant to this statement, filed a memorandum of law to inform the second land commission of the applicable law pertaining to valuation of unique property by the "bands of value" method. The second land commission, however, ruled during the hearing that it had no authority to consider such law, because it was not in the instructions.

The second land commission was appointed by the District Court on July 11, 1991. In the opening paragraph of the Order, the court informed the new land commission of the amount of the tainted award reached by the first land commission. The District Court, by Order entered August 30, 1991, denied the landowner's Motion for Cautionary Instruction.

The hearing before the second land commission took

place on September 11, 12, 13, 16, 1991, and concluded on October 8-9, 1991. On September 23, 1991, the landowner served a subpoena on an appraiser, William Bowen, identified as a potential government witness and whose report had been disclosed by the government in discovery. The subpoena required his presence at the hearing and for a deposition prior to the resumption of the hearing. The government filed a Motion In Limine and a Motion to Quash, along with a cover letter addressed to the District Court requesting an expeditious ruling, copies of which were received by the landowner on Friday afternoon, September 27, 1991. On Monday, September 30, 1991, the landowner transmitted a letter to the District Court by telecopier, requesting that no action be taken until the landowner filed a formal response. On October 1, 1991, the landowner mailed out his formal oppositions to the government's motions. The District Court ruled *ex parte* on October 1, 1991, granting the government's motions, without waiting to receive the landowner's response.

The area taken consists of the top 175.76 acre scenic plateau of a forested 596 acre mountain, with eight miles of roughed-in roads, in Harpers Ferry, West Virginia, located 3,000 feet south of the commuter train station to Washington, D.C. The landowner's evidence established that the highest and best use of the entire 596 acres was for development as a ski slope and resort complex, with a conference motel and living units, with a second best alternative highest and best use for small lot residential development, consistent with existing surrounding subdivisions. The government's appraisers testified that the property had no present use for which there was an existing market demand, and that the highest and best use was to hold the property until a demand developed for residential use.

Both the landowner, a professional engineer, and his ski resort planning and appraisal expert testified to an opinion on value of the entire property based upon the different, compatible uses which could be made of different sections of the property in both the before and after situations. The value of the component parts of the property were added together to arrive at an opinion of value for the entire property. The highest and best use as a ski slope and resort complex was based upon using the steep slope as a ski area, and the scenic plateau for the base lodge, parking, conference motel, condominiums and timeshares. This property is unique, because properties with recognized ski resort potential are not bought and sold on the open market, and there were no recent sales in the immediate vicinity of Harpers Ferry of large parcels with intensive residential potential.

The land commission stated that it was rejecting the testimony of the landowner's ski resort expert strictly on a legal basis, because the "bands of value" methodology violated the instruction on the unit rule:

> You are to consider the value of the land as a whole, as a unit. While in making your award you should consider all elements of value, such as farming value, if any, timber value, if any, or mineral value, if any, you cannot separately value each of these elements and aggregate them to reach the value of the entire tract. That is because these factors of value do not exist independently of each other and cannot be realized at the same time. The commission never stated why it did not consider the landowner's testimony.

The land commission elected to rely heavily upon one government appraiser, Richard Bowers, as the most reliable. Bowers opined that the steep, unbuildable slopes

and lower land at the foot of the mountain were substantially more valuable than the scenic plateau, and that the highest and best use was to hold the property until a demand developed for residential lots. Like the landowner and his ski resort expert, Bowers separately valued the plateau and the remaining property, and added the two values together. Yet, his testimony was accepted.

The land commission determined that the highest and best use is for large lot residential development, and that the scenic plateau taken was the most valuable part of the property. Without any explanation as to how it arrived at its numbers, the land commission found a before value of $791,300, an after value of $395,500, and just compensation of $395,500. The after value, subtracted from the before value, equals $395,800, not $395,500.[1]

The second land commission issued its report on October 17, 1991. The United States District Court, on April 14, 1993, denied the landowner's objections and adopted the report and recommendations of the land commission.[2] Final judgment was entered on May 10, 1993,

[1] The Court of Appeals incorrectly states that the landowner failed to raise this arithmetic error,when it was in fact raised several times, in Appellant's Brief at p.25 and p.49, in Appellant's Reply Brief at p.16, and at the trial level, at pp.163-164 in the Appendix to the Court of Appeals briefs. The Court of Appeals made other factual errors in its summary, including an incorrect statement that opinions favoring a ski area highest and best use was "a fact rejected by the commission," and based upon a commission finding that it was "neither available nor reasonably probable." Opinion, p.13, and p.10 f.6. The land commission, in fact, never reached the merits of the ski resort highest and best use. What the commission would have ruled, if it had, is sheer speculation.

with the landowner filing his Notice of Appeal on June 10, 1993. The United States Court of Appeals for the Fourth Circuit once again assumed jurisdiction under 28 U.S.C. § 1291 and, on September 19, 1994, affirmed the District Court judgment, with one judge filing a vociferous dissent. By Order dated October 13, 1994, the landowner's Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

THE FUNDAMENTAL INTEGRITY AND CONTINUED VIABILITY OF THE LAND COMMISSION PROCEDURE AS A FAIR AND JUST ALTERNATIVE TO A JURY TRIAL IN A CONSTITUTIONALLY MANDATED PROCEEDING AGAINST AN INNOCENT LANDOWNER IS BASIC TO THE FOUNDING PRINCIPLES ON WHICH OUR SYSTEM OF GOVERNMENT IS BASED.

The landowner is requesting the issuance of a writ of certiorari, because the land commission proceedings in this case have so far departed from fundamental and established principles of due process as to require this Court's intervention.

The United States Court of Appeals for the Fourth Circuit has held that due process in a land commission proceeding does not include the right to be heard before a decision is rendered, the right to a requested instruction on

---

[2] The opinion does not address specific objections that the land commission report selectively omits or ignores numerous examples of essential evidence of record supporting the landowner's position.

law not included in the instructions proposed, and the right to a tribunal of land commissioners which is not tainted by knowledge of the reversed award of the previous land commission. The majority opinion rendered in this case by the Court of Appeals held that all of these errors were harmless, because "it is beyond dispute that commissions and juries are dissimilar entities," due to the special expertise that land commissioners are supposed to have. App.12a-13a, opinion at p.7. The majority also held that, "although it may be prejudicial to inform a jury of a prior award in a civil action, the same is not true with regard to a commission." App.12a-13a, opinion at p.7. Judge Osteen, who authored the dissenting opinion, disagreed that these errors were harmless. He held that "due process is the cornerstone of a land condemnation proceeding due to the involuntary nature of the initial taking as well as the subsequent proceeding to award just compensation." App.36a-37a, opinion at p.19. A decision by this Court on the issue presented will have a widespread and beneficial impact on federal condemnation proceedings.

This Court ruled in *United States v. Merz*, 376 U.S. 192, 198, 84 S.Ct. 639, 11 L.d.2d 629, 634 (1964), that the District Court's "first responsibility" is "careful instruction of [the land commissioners] on the law." The District Court, in the first paragraph of the Order of appointment, with instructions attached thereto, informed each land commissioner of the dollar amount of the reversed award of the first land commission, implying that there was nothing wrong with the award and that the reversal was due to a technicality, i.e. because one of the three commissioners was "declared to be interested in the outcome of the case." App.65a. The Order noted that examination of the proposed commissioners had been conducted on February 4, 1991,as required by *Rule 71A(h)*, and no objections had

been filed within the time allowed. The District Court undermined an important purpose of the examination procedure, to allow the parties to determine whether the proposed commissioners had any prior knowledge of the case, by informing them of the award after the opportunity to object to appointment had passed. The District Court also violated this Court's direction in *Merz* by refusing to give a cautionary instruction.

In a state condemnation case, where a jury trial was provided to landowners dissatisfied with the award of a commission, the landowner's counsel informed the jury during the opening statement of the dollar amount the commissioners had awarded. Although the jury was instructed to disregard the remark, the appeals court, reversing the judgment, commented:

> This raises a question whose answer has eluded mankind for centuries. How do you unring a bell? Inherent prejudice is the root of the rule prohibiting mention of the amount of damages awarded by commissioners.

Kansas City v. Peret, 574 S.W.2d 443, at 444 (Mo. 1978). The court also stated that:

> It has long been established in this state that "[t]he jury [in a condemnation action] have no more right to know what the report of assessment of the commissioners was than any jury in any case has to know what the verdict of a previous jury was in the same case." *Missouri Pac. Ry. Co. v. Roberts*, 187 Mo. 309, 86 S.W. 91, 94(1905).

Id. Another recent state case has observed:

> This Court has stated on numerous occasions that as a general rule the result of a former trial or the opinion and mandate of the appellate court are not proper evidence in the retrial of a cause of action....

Merchants Co. v. Hutchinson, 199 So.2d 813, at 816 (Miss. 1967. Yet the District Court, in its Order denying the landowner's request for a cautionary instruction, asserted that its action was proper, because the opinion of the United States Court of Appeals for the Fourth Circuit mentioned the amount of the first land commission's award.

One court articulated the impact of the error as "robbing the trial of one of its chief characteristics, that of a trial *de novo* before another tribunal uninfluenced by what the first tribunal has done." *State ex rel State Highway Commission v. Artz*, 45 S.W.2d 81, 2 (Mo. 1932).

Judge Osteen, in his dissent, acknowledges as a "creative and valid argument" the landowner's assertion that the second commission simply increased the previous award by fifty percent.[3] Even more "compelling," however, in his opinion, is the fact that the commission adopted the before taking value of a government expert, but did not accept the after taking value or the just compensation calculation of any expert, disregarding the testimony from both parties in arriving at its own determination. In answer to the majority's assertion that the hearing transcripts and report evidence no indication that the commission was influenced by the prior award, Judge Osteen points out that "there is also no indication that it did not influence the decision, especially considering that the second commission arrived at a conclusion not supported by expert testimony." App.34a-35a, opinion at p.18. Judge Osteen insisted that disputes involving the fairness of a judicial procedure should be resolved in favor of the substantial rights of the involuntary litigant in a land condemnation proceeding,

---

[3] The fact that the before and after arithmetic does not compute also tends to show prejudice.

particularly where the court refused to cure the error with a cautionary instruction requested by the landowner and conceded to be an appropriate remedy by the government. App.36a-37a, opinion at p.19.

The United States Court of Appeals for the Third Circuit held that "the exclusion of one or all of either party's experts can influence substantially the amount of the compensation set by the fact-finder." *United States v. 68.94 Acres of Land*, 918 F.2d 389, 393 (3d Cir1990). The land commission excluded the testimony of the landowner's ski resort appraisal expert as a matter of law based upon his valuation method; and ignored, for unelucidated reasons, the testimony of the landowner which employed the same valuation method and the testimony of one of the landowner's residential appraisers. Although the testimony was summarized, albeit selectively, the land commission did not consider any of the landowner's value evidence in arriving at its conclusion.

The landowner, in his objection to the proposed "unit rule" instruction, specifically explained why it would be misleading and deficient based upon the testimony which would be presented by the landowner and his ski resort appraisal expert, and why the requested supplemental instruction on the "bands of value" methodology should be given. The landowner, in his Court of Appeals brief, quoted from *Cade v. United States*, 213 F.2d 138 (4th Cir. 1954), which established that the valuation of different areas of property based upon different, but compatible, uses, which are added together to arrive at a value of the entire property is an admissible and proper valuation method. In *Cade*, as in this case, the lower court had improperly excluded the landowner's evidence of value under the unit rule. See also *United States v. Wise*, 131 F.2d 851 (4th Cir. 1942); *United States v. 97.19 Acres of Land*, 582 F.2d 878 (4th

Cir. 978). Even the government's expert ski resort consultant conceed that he had written an article for an appraisal journal stating that real estate for land development at a ski resort should be valued separately from the land for the ski operation. It is only inconsistent and incompatible uses that cannot be aggregated to arrive at a value of the entire property. *United States v. 320.0 Acres of Land*, 605 F.2d 762, 817 n.124(5th Cir.1979).

The Court of Appeals for the First Circuit has stated that:

> Manifestly, if the [land] commission is given an erroneous instruction, or no instruction at all, on a question of law which may have an impact upon their determination of fair market value, their decision is tainted in the same manner as a jury verdict returned upon an erroneous instruction.

United States v. 125.07 Acres of Land, 667 F.2d 243, 252 (1st Cir. 1981).

The District Court, in its Order denying the requested instructions, conceded that the landowner's proposed instructions "are somewhat more detailed in certain respects," and stated that "the prior instructions in no way prohibit the presentation of the issues contained in Defendant's proposed instructions." App. 60a In fact, the land commission ruled late in the hearing that it would not apply any law not contained in the Instructions issued by the District Court, and cut off the landowner's cross-examination of the government's appraisers on the issue of severance damage - their conclusion that the plateau was substantially less valuable than the foot of the mountain and the unbuildable mountainside - based upon the misleading unit rule set forth in the instructions. In its report, the land commission excluded the landowner's ski resort expert's testimony from consideration in its report as

a matter of law, which was a direct result of the court's refusal to give the "more detailed" instruction requested by the landowner. The testimony of the government's appraiser, Bowers, who used the same valuation method, was, however, accepted and relied upon by the land commission.

Even the Court of Appeals does not contend that the District Court gave an instruction on severance damage, competence of the landowner to testify to value, or valuation of unique property by the "bands of value" method. The Court of Appeals held that: the "bands of value" method is inadmissible under the unit rule, notwithstanding *Cade*; the instruction to use the before and after measure of damages in a partial taking "adequately incorporates the concept of severance damages"; the general Just Compensation instructions "adequately embody the valuation of unique property"; and the general instruction on Weighing the Evidence "adequately embod[ies]" the competence of the landowner to testify to an opinion of value. App.18a-21a, opinion at 10-11.

The inconsistency in the land commission's determination that the plateau was the most valuable part of the property, while relying heavily on a government appraiser whose opinion of value was premised upon the plateau as being the least valuable part of the property, is the result of the District Court's refusal to specifically instruct the commission on the related issues of severance damage and the propriety of recognizing in a valuation that some parts of a property may be more valuable than other parts, i.e. the "bands of value" method of appraisal. The landowner's case, consequently, did not receive the fair consideration to which he was entitled.

It is also likely that the land commission simply ignored the landowner's testimony without comment, due to

the absence of any instruction informing them that the landowner is competent to testify to the value of his property and that his testimony alone, if accepted, is sufficient to support an award.

Instructions which make, at best, tenuous and ambiguous reference to fundamental issues of severance damage, the competence of the landowner to testify to the value of his property, and the proper available methods of valuation of unique property for which there is no market data, do not satisfy due process under *Merz*. This Court should not permit these legal deficiencies to be justified by determining that land commission proceedings require less due process than jury trials. The same standards applicable to instructions in jury trial should apply to land commission proceedings. The rule on jury instructions is that a requested instruction must be given if it expresses a correct statement of the law, deals with an issue properly before the jury, is not covered in the instructions given, and would result in prejudice if not given. *National Fire Insurance Co. v. Housing Development Co.*, 827 F.2 1475 (11th Cir. 1987). As long as there is some evidence supporting a party's theory of the case, the instruction must be given. *Carvel Corp. v. Diversified Management Group, Inc.*, 930 F.2d 28, 230, 232 (2d Cir. 1991) ("When jury instructions... give the jury a misleading impression or inadequate understanding of the law, a new trial is warranted.") See also *United States v. 74.60 Acres of Land*, 358 F.2d 143 (7th Cir.1966). Neither the government, the District Court, nor the Court of Appeals contend that the landowner's proposed instructions were misleading or incorrect, would not address an issue expected to be generated by the evidence, or were given in the prior instructions. As Judge Osteen pointed out, issues implicating the fairness of a proceeding should be resolved in favor of the substantial

rights of an involuntary litigant.

The Fourth Circuit also held that a failure to object to land commission instructions on a first appeal results in a waiver which excuses the District Court from its obligation under *Merz* to ensure that the land commission is correctly instructed in a second proceeding after a reversal and remand. *Merz* provides for no such exceptions. This shortsighted and unrealistic ruling, requiring the identical land commission instructions to be given again, presumes that the evidence at the second proceeding will be identical, and that all of the same experts and other witnesses will be alive and available for the second, supposedly *de novo*, hearing. [4]

The constitutional due process right requires that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.E.2d 113, 118 (1971).

In *United States v. 320.0 Acres of Land*, 605 F.2d 762 (5th Cir. 1979), the court ruled that a fatal procedural error had been committed by the district court in entering two pretrial rulings limiting the admissible evidence of fair market value *ex parte*. "To bind litigants to rulings on the basis of evidence and arguments they have had no opportunity to contest is the most elementary sort of due process violation." *Id.* at 780.

Judge Osteen's opinion on the District Court's grant of the government's motions, which precluded the

---

[4] In this case, the landowner lost the live testimony of two witnesses in between the first and second land commission proceedings: a water dowser became disabled; and the expert meteorologist died.

landowner from conducting a deposition and presenting the testimony of one expert, says it all:

> Preventing the landowner from acquiring an opportunity to be heard is the most serious type of due process violation. *See 320.0 Acres of Land*, 605 F.2d at 780 (while denial of opportunity to be heard was unintentional, the due process violation remained reversible error). Further, such a seemingly intentional act does not constitute harmless error. While the majority focuses on the merits of the landowner's motion to subpoena the Government's witness and the supervisory power of the district court, the ultimate issue centers on an opportunity to be heard. Regardless of the merits of his position, the landowner has a right to be heard, especially when the question before the district court was whether exceptional circumstances existed to allow the subpoena. The district court determined that exceptional circumstances did not exist after hearing only from the Government. By entering two *ex parte* orders in the face of the landowner's request to be heard, the district court effectively denied the landowner, an involuntary litigant, a substantial right.

App.38a-39a, opinion a p.20. The deprivation of this fundamental due process right is not harmless.

CONCLUSION

Judge Osteen, pointing out that, "not once, but twice, the fundamental fairness and integrity of the land commission proceeding was jeopardized," App.30a-31a, opinion at p.16, succinctly and eloquently summarizes in closing the reasons a writ of certiorari should be granted.

> Upon review of this same case during its first appearance in this Court, the Fourth Circuit through

> a panel of Judges Butner, Russell, and Wilkins opined that "[p]ublic confidence in the fairness of a proceeding is important at all levels, including local tribunals established to determine just compensation following condemnation of property pursuant to the government's eminent domain power." *Werner*, 916 F.2d at 178. After fourteen years, the landowner will not receive what we ask him to accept as just compensation. I dare say that he finds no confidence in the fairness of our procedures. While it is not necessary that litigants agree with the final award, it is necessary that the final award in reality and in perception be based upon a foundation of fairness. While I understand the realities of crowded dockets and scarcity of judicial resources, I find the results here to be a compromise of this most basic principle.

App.38a-39a, opinion at 20.

For the reasons stated above, the Petitioner respectfully requests that this Petition for Certiorari be granted, to allow this Court to determine whether fundamental and established principles of due process apply to land commission proceedings.

Respectfully submitted,

R. EDWIN BROWN*
LAURIE R. HANIG
BROWN AND STURM
260 East Jefferson Street
Rockville, Maryland 20850
(301) 762-2555
Attorneys for Petitioner
* Counsel of Record

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Robert Stanton Werner,
Defendant-Appellant,

No. 93-1738

v.

175.76 Acres of Land, more or less,
situated in the County of Jefferson,
State of West Virginia; Unknown
Owners,
Defendants.

Appeal from the United States District Court for the
Northern District of West Virginia, at Elkins.
Robert Earl Maxwell, District Judge.
(CA-80-7-M)

Argued: February 10, 1994
Decided: September 19, 1994
Before RUSSELL and WILLIAMS, Circuit Judges, and
OSTEEN, United States District Judge for the Middle
District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion. Judge Osteen
filed a separate concurring and dissenting opinion.

COUNSEL

ARGUED: R. Edwin Brown, BROWN & STRUM, Rockville, Maryland, for Appellant. Jacques B. Gelin, Environment and Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Laurie R. Hanig, BROWN & STRUM, Rockville, Maryland, for Appellant. Myles E. Flint Acting Assistant Attorney General, John A. Bryson, Michael K. Baker, Joy Ryan, Environment and Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

Robert Stanton Werner appeals the district court's judgment awarding $395,500 as just compensation for the condemnation of 175.76 acres of his property in Jefferson County, Virginia. Werner claims that the district court committed several errors, including: (1) informing the second Land Condemnation Commission (the "Second Commission") in its order of appointment of the award granted by the first Land Condemnation Commission (the "First Commission"); (2) entering two *ex parte* orders

requested by the Government; (3) providing erroneous instructions to the Second Commission; and (4) adopting the Second Commission's inadequate and conclusory report. For reasons set forth below, we find that the district court did not commit reversible error, and, therefore, we affirm the lower court's determination of just compensation.

I.

On February 5, 1980, the United States filed a complaint and declaration of taking, acquiring 175.76 acres of a 596-acre tract in Jeffer-

son County, West Virginia, owned by Werner (the "landowner"). The property taken was a plateau of mountainous land located across the Shenandoah River from the Harpers Ferry community. The United States obtained the land "for the proper administration, preservation, and development of the Appalachian National Scenic Trail for the benefit and enjoyment of the public." (J.A. at 15.)

On October 6, 1982, the district court appointed the First commission to determine just compensation for the condemned land, pursuant to Fed. R. Civ. P. 71A(h). The First Commission held a hearing and filed its report on June 12, 1985, awarding the landowner $263,640. The district court adopted the report in November 1988, and the landowner appealed to this court. this court reversed the judgment and remanded for "a new determination of [just] compensation," finding that the district court had appointed a biased commissioner to the three-person panel and had refused to replace him upon the landowner's objection. *United States v. Werner*, 916 F.2d 175, 179 (4th Cir. 1990).

On July 11, 1991, the district court issued an order appointing the Second Commission, which was made up of a new three-member panel. The order included the same instructions previously given to the First Commission and the opening paragraph informed the Second Commission of the award rendered by the First Commission. The landowner filed a motion objecting to the inclusion of the prior award, and requesting that the relevant pages be removed from the possession of each commissioner and

acautionary instruction be given. The district court denied the motion, finding that "[t]he prior award [was] a matter of public knowledge" since it was contained in a published Fourth Circuit opinion, and that the instructions already given to the Second Commission adequately addressed the proper grounds for determining an award. (J.A. at 99.)

The Second Commission held a trial for six days in September and October 1991. In order to accomplish its assigned task, the Second Commission focused on evidence regarding the highest and best use of the land at the time of the taking, and the fair and reasonable market value of the landowner's property both before and after the taking of the 175-acre tract.

In reaching its determinations, the Second Commission limited each party to four valuation witnesses.[1] The landowner and William Malcolm, an expert real estate witness, both testified that the best use of the land before the taking was as a ski resort, that the best use after the taking was for residential development, and that just compensation was between $8,010,000 and $10, 785,142. Another landowner witness, real estate expert Paul Payne, testified that the best use of the land before the taking was for a recreational and residential development, that the best use after the taking was for a large lot subdivision, and that just compensation was approximately $1,260,334. The fourth landowner witness, C. William Hensell, asserted that the best use of the land before the taking was for residential development, the best use after the taking was for a devlopment of three- to five-acre residential homes, and that just compensation was $1,667,268.

The Government presented only two valuation witnesses. Richard Bowers testified that the best use before

---

[1] One of the district court's procedural instructions to the Second Commission provided as follows:

You are at liberty to impose a reasonable limit (say three or four per side) on the number of witnesses that may testify as to land values or damages, provided that this limitation is announced in advance of the hearing. In such an event the parties will also be allowed to present other witnesses to testify as to other facts and aspects of the case.

(J.A. at 72.)

and after the taking was as a large lot residential subdivision and determined just compensation to be $211,000. Gregory Didden, another expert real estate appraiser for the Government, testified that the highest and best use of the property before and after the taking was for five-acre residential lot sales. He calculated just compensation as $158,400.

After four days of testimony and the conclusion of the direct cases of both parties, the Second Commission took a three-week recess. During this period, the landowner subpoenaed William Bowen, a real estate appraiser identified as a potential Government Government witness but not called to testify. The Government filed a motion to quash the subpoena and a motion in limine in the district court, along with a letter

requesting an expedited ruling. The district court complied and issued an *ex parte* order granting the Government's motion to quash because the time for discovery had elapsed when the trial began. The court also granted the Government's motion in limine because the landowner had already presented four valuation witnesses, the maximum number allowed under the rules set forth by the Second Commission. Therefore, although Bowen was called as a rebuttal witness before the Second Commission, he was prohibited from testifying on highest and best use and on value.

On October 24, 1991, the Second Commission filed its report, rejecting the landowner's position as to the highest and best use of the land and finding that the highest and best use was as a large lot residential development. The Second Commission calculated the value of the landowner's property before the taking and the value of the landowner's remaining property after the taking, the difference between the two values constituting "just compensation." It determined that the market value of the entire tract of land before the taking was $791,300, and that the market value of the portion remaining after the taking was $395,500. Accordingly, the Second Commission awarded the landowner $395,500 [2]as just compensation for the land taken. The landowner filed objections to the report and the

[2] The parties do not raise an issue as to the $300 discrepancy in the award figure ($791,300 - $395,500 = $395,800 and not $395,500), and we see no explanation in the record.

Government filed a response. On April 15, 1993, the district court entered an order denying the landowner's objections and adopting the report and award of the Second Commission. The landowner filed a timely appeal on May 10, 1993.

II.

Initially, we must decide whether the district court committed reversible error by informing the Second Commission of the dollar amount of the award reached by the First Commission, and by denying the landowner's request for a cautionary instruction. the landowner contends that the district court's inclusion of the amount awarded by the First Commission in its order of appointment and instructions to the Second Commission was prejudicial , and tainted

the Second Commission's determination of just compensation. This is a question of law which we review *de novo*. *See Meekins v. United Transp. Union*, 946 F.2d 1054, 1057 (4th Cir. 1991). We find that the district court did not err when it informed the Second Commission of the outcome of the prior condemnation proceeding, and, to the extent that there was any error, it was harmless.

The landowner relies on the general rule that it is improper and prejudicial to inform a jury in a civil action of a prior award in an earlier adjudication of the same case. See Olitsky v. Spencer Gifts, Inc., 964 F.2d 1471, 1475-76 (5th Cir.) (recognizing that disclosure of the result of the first trial to the jury could be grounds for reversal, although the district court's curative instruction was sufficient to correct the error), *cert. denied*, 113 S.Ct. 1253 (1993); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1351 (3d Cir. 1975) ("The admission of a prior verdict creates the possibility that the jury will defer to the earlier result and thus will, effectively, decide a case on evidence not before it."). However, even accepting the validity of this principle, the landowner's reliance theron is misplaced because the trier of fact in this action was not a jury, but rather a commission appointed pursuant to Fed. R. Civ. P. 71A(9h).

In the context of a condemnation action, Rule 71A(9h) provides that the issue of compensation is determined in a trial by jury, "unless the court in its discretion orders that, because of the character, location or quantity of the property to be condemned, or for other

reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it."[3] A commission is generally appointed in complex cases requiring greater expertise and knowledge that possessed by a jury of laypersons. *See Alabama Power Co. v. 1354.02 Acres*, 709 F.2d 666, 667-68 (11th Cir. 1983) (district court may appoint commissioners rather than a jury when "the ends of justice best would be served"); *United States v. 320.0 Acres of Land*, 605 F.2d 762, 828 (5th Cir. 1979) ("[A] commission is to be used only for exceptional cases."). Furthermore, because of the expertise of its members, a commission is required to file a report

---

[3] Rule 71A(h) does not offend the right to trial by jury because there is no constitutional right to a jury in an eminent domain proceeding. *United States v. Reynolds*, 397 U.S. 14, 18 (1970).

detailing the procedures and reasoning used in calculating a particular award. *See United States v. Merz*, 376 U.S. 192, 198 (1964); *United States v 434.0 Acres of Land*, 792 F.2d 1006, 1011 (11th Cir. 1986) ("Use of the commission, rather than a jury, means that the *trial court* will impose a 'somewhat stricter' review over the report than it would with a general jury verdict." (emphasis in original) (quoting 320.0 Acres of Land, 605 F.2d at 809-10 n.101)).

When appointed, a commission has the same powers afforded to a special master as provided in Fed. R. Civ. P. 53(c).[4] *See* Fed. R. Civ. P. 71A.(9h). A commission has the authority to regulate the proceedings held before it, which entails presiding over the hearings as well as serving as the finder of fact. here, the Second Commission was empowered to rule on the admissibility of evidence, and was instructed to exclude "incompetent, irrelevant, or legally inadmissible evidence." (J.A. at 71.). Thus, it was the Second Commission's responsibility to disregard evidence it found to be objectionable or extraneous, including statements such as the one regarding the prior award at issue in this case. Accordingly, it is beyond dispute that commissions and juries are dissimilar entities and, although

---

[4] Under Rule 53(c), "[t]he order of reference to the master may specify or limit the master's powers..." Subject to such limits, a master has the power to: (1) regulate all proceedings; (2) require the production of evidence; (3) call and examine witnesses; and (4) rule on the admissibility of evidence. Fed. R. Civ. P. 53(c).

it may be prejudicial to inform a jury of a prior award in a civil action, the same is not true with regard to a commission.

Nonetheless, had we determined that the district court erred by informing the Second Commission of the prior award, we would have found that the error was harmless. *See* Fed R. Civ. P. 61.[5] The Sec-

---

[5] Fed R. Civ. P. 61 provides as follows:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court...must disregard any error or defect in the proceeding which does not affect substantial rights of the parties.

ond Commission awarded the landowner $131,860 more than the First Commission, and it adequately set forth in its report independent evidentiary bases for the award. In fact, there is no indication from the hearings or the Second Commission's report that the findings were influenced in any way by the prior award. Additionally, the Chairman of the Second Commission was an "experienced attorney," (J.A. at 71), and the prior award was contained in a published decision, Werner, 916 F.2d at 176, therefore the Second Commission had access to the amount of the prior award. In sum, there is nothing in the record to suggest that the Second Commission's Knowledge of the prior award adversely affected the landowner's substantial rights in any way.

III.

The landowner also contends that the district court erred by entering two *ex parte* orders requested by the Government. He seeks reversal based on the claims that (1) the district court did not have jurisdiction to rule on the Government's motion in limine and motion to quash, and (2) the district court's *ex parte* order violated his due process rights. We find the landowner's contentions to be without merit.

This issue arose after the landowner subpoenaed William Bowen, a real estate appraiser who was identified as a potential Government witness but not called during the Government's case in chief. The Government filed a motion in limine and a motion to quash in the district court, along

with a letter requesting "that the court shorten the time for response and make an expedited ruling." (J.A. at 100.) The district court granted the Government's motion to quash and motion in limine. Therefore, although Bowen was called as a rebuttal witness, he was not allowed to testify as to highest and best use and value of the property.

We need not resolve these issues, however, because even if the district court intruded on the Second Commission's authority, the error was harmless. See Fed. R. Civ. P. 61; Blum v Cottrell, 276 F.2d 689, 693 (4th Cir. 1960) ("[T]he question was one for the jury and not for the judge...[but] the ruling was not so prejudicial to the plaintiff as to require a reversal of the judgment."). The landowner's motion

to subpoena Bowen was made after the discovery period had lapsed and after the parties had finished presenting their direct evidence, making it too late to depose Bowen and admit further evidence or testimony in the landowner's case in chief. Moreover, the landowner had already presented four valuation witnesses, the maximum number allowed pursuant to the Second Commission's self imposed rule. Furthermore, the landowner was allowed to present Bowen as a rebuttal witness on matters not concerning land valuation. Finally, Rule 71A(9h) makes clear that "[t]rial of all issues shall otherwise be by the court," thus evidencing the fact that the district court retained some degree of supervisory power over the Second Commission. In conclusion, it is evident that the district court's resolution of these motions did not impinge upon the landowner's substantial rights.

IV.

Next, the landowner claims that the district court improperly instructed the Second Commission. We disagree.

The district court provided the Second Commission with the exact same instructions that were given to the First Commission. The landowner, however, did not raise any issue regarding the instructions in his prior appeal before this court, *see Werner*, 916 F.2d at 176, and therefore, waived these claims. See *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) ("[T]he mandate of a higher court is 'controlling as to matters within its compass.'...[T]he rule

forecloses litigation of issues decided by the district court but foregone on appeal or otherwise waived." (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S.161, 168 (1939))); *United States v Wright*, 716 F.2d 549, 550 (9th Cir. 1983) ("When a party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter.").

Notwithstanding that waiver, this court has held that "[t]he district court has considerable discretion in choosing the specific wording of instructions." *United States v. Piche*, 981 F.2d 706, 712 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2356 (1993). Relying on this principle, we find that the district court properly instructed the Second Commission.

Primarily at issue is Just Compensation Instruction 4- Value as a Whole - which provides as follows:

> You are to consider the value of the land as a whole, as a unit. While in making your award you should consider all elements of value, ... you cannot separately value each of these elements and aggregate them to reach the value of the entire tract. This is true because these factors of value do not exist independently of each other and cannot be realized at the same time.

(J.A. at 78.) We find that this instruction adequately represents the unit rule. The landowner was entitled to have the Second Commission consider all factors of value of the property. The landowner, however, was not entitled to have all factors affecting the value of the property added together and to have the total taken as the market value of the property.[6] *See United States v. 91.90 Acres of Land*, 586

---

[6] The Second Commission properly excluded testimony of the value of part of the property as a ski resort because evidence in the record demonstrated t hat such use was neither available nor reasonably probable. Therefore, there was no reason to include that possible usage as part of a unit valuation. *See Olson v United States*, 292 U.S. 246, 257 (1934) ("Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration....").

F.2d 79, 87 (8th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979); *United States v. 97.19 Acres of Land*, 582 F.2d 878, 882-83 (4th Cir. 1978); *Cade v. United States*, 213 F.2d 878, 882-83 (4th Cir. 1978); *Cade v. United States*, 213 F.2d 138, 142 (4th Cir. 1954).

The landowner also contends that the district court erred in failing to instruct the Second Commission regarding severance damages, valuation of unique property, and competence of the landowner to testify to an opinion of value. We find these claims to be without merit. Just Compensation Instruction 7 - Partial Taking - provides as follows:

> You may have instances in which the Government has taken a part of a larger tract, leaving the remainder to the land-

> owner....[T]he taking may not affect the value of the remainder in any way [or] it may either damage or benefit the remainder....In any such situation the measure of just compensation is the same, that is, the difference between the fair and reasonable market value of the land immediately before the taking and the fair and reasonable market value of the portion that remains after the taking....

(J.A. at 79.) This instruction adequately incorporates the concept of severance damages. See *United States v. 2.33 Acres of Land*, 704 F.2d 728, 730 (4th Cir. 1983) ("The commissioners purported to use a before and after method of valuation; and...if this method is properly employed when there is a partial taking, severance damaes should not be allowed."); *91.90 Acres of Land*, 586 F.2d at 86 ("It is incorrect to think of 'severance damage' as a separate and distinct item of just compensation apart from the difference between the market value of the entire tract immediately after the taking....The matter is taken care of automatically in the 'before and after' submission."). The instructions also adequately embody the valuation of unique property, see (J.A. at 75-77 - Just Compensation Instructions 1-3,) and competence of the landowner to testify to an opinion of value, *see* (J.A. at 73-74 - Weighing the Evidence Instructions 2 and 3).

V.

We must also determine whether the district court erred in adopting the Second Commission's report. The

findings of the Second Commission must be adopted unless clearly erroneous. Fed R. Civ. P. 53(e)(2), 71A(h); *Merz*, 376 U.S. at 198; *Werner*, 916 F.2d at 178. This court has summarized the standard of review as follows: "Unless the findings of the commission be shown to the district court to be 'clearly erroneous' they must be accepted,...and unless this court, in turn, finds error in the acceptance or rejection by the district court, the decision must be affirmed." *United States v. Payne*, 368 F.2d 74, 76 (4th Cir. 1966) (citations omitted).

Nonetheless, as emphasized by the landowner, the Second Commission's report must be made up of more than conclusory findings.

Merz, 376 U.S. at 198; *see also Prechter v. United States*, 400 F.2d 124, 127 (5th Cir. 1968) ("A mere summary of the evidence and the assertion of conclusory statements is not sufficient."). Otherwise, the district court would be unable to discern the Second Commission sorted through conflicting evidence and testimony. *Merz*, 376 U.S. at 198. In *Merz*, the Supreme Court described an adequate report as follows:

> [Although] [c]onclusory findings are alone not sufficient..[t]he commissioners need not make detailed findings such as judges do who try a case without a jury....[However,] [they] can be instructed to reveal the reasoning they use in deciding on a particular award, what standard they use in deciding on a particular award, what standard they try to follow, which line of testimony they adopt, what measure of severance damages they use, and so on. We do not say that every contested issue raised...[or] that there must be an array of findings of subsidiary facts to demonstrate that the ultimate finding of value is soundly and legally that the ultimate findings of value is soundly and legally based. the path followed by the commissioners in reaching the amount of the award can, however, be distinctly marked.

Id. at 198-199. Moreover, we note that it is the function of the Second Commission, not this court, to make credibility determinations and to assess the weight to be given to

witnesses' testimony. See *United States v. 9.20 Acres of Land*, 638 F.2d 1123, 1127 (8th Cir. 1981).

The landowner argues that the district court erred in adopting the Second Commission's report. He claims that the Second Commission's findings of fact were conclusory, and that the report lacked sufficient explanation to be reviewed under the clearly erroneous standard. We disagree. After careful review of the Second Commission's report, we find that the Second Commission adequately set forth the bases for its findings of fact and its just compensation award, and that the findings and award were not clearly erroneous.

The Second Commission's thirteen-page report provides a brief history, an exhaustive account of the evidence presented at the hearing, and eight factual findings. The report summarizes the testimony of every witness, and, quite significantly, indicates both the

testimony upon which the Second Commission primarily relied in making its findings as well as its reasons for accepting such testimony. The report states that "the Commission utilized comparable sales as its standard of value approach."[7] (J.A. at 149.) The Second Commission rejected the landowner' position that the highest and best use of the property was a winter ski resort because "of all the fair market value experts who testified for the landowner and the government, not one opined in favor of a winter ski resort.[8] (J.A. at 149.) Richard L. Bowers, an expert estate appraiser for the Government, testified that the highest and best use before and after the taking was development of a large lot subdivision. The report states: "Bowers used the market data and direct sales approaches in arriving at his opinions and provided to the commission seven examples of comparable sales, upon which the commission relied heavily in its decision." (J.A.) at 144. Gregory Didden, another expert real estate appraiser for the

---

[7] Comparable sales are the best evidence of value. *United States v. Upper Potomac Properties Corp.*, 448 F.2d 913, 918 (4th Cir. 1971); *United States v. Whitehurst*, 337 F.2d 765, 775 (4th Cir. 1964).

[8] The burden is on the landowner to show that his suggested "highest and best use" is reasonably probable and that tit has a real market value. *See United States ex re. Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 273 275-6 (1943). Here, evidence in the record demonstrates that the landowner's idea regarding a ski resort was merely "speculation and conjecture." *Olson v. United States*, 292 U.S. 246, 257 (1934).

Government, testified that the highest and best use of the property before and after the taking was for five-acre residential lot sales. the report states that the Second Commission also placed great reliance on Didden's testimony because he used the comparable sales approach to value and provided numerous examples of the sales that he used in his analysis.

The landowner presented four valuation witnesses, but two found that the highest and best use of the property was a ski resort, a fact rejected by the Second Commission. The other two witnesses for the landowner testified that the highest and best use of the property before and after the taking was as a residential development, but the Second Commission explained it s lack of confidence in their respective valuation methods. Although William Hensell, a real estate expert, testified that he was using comparable as his method-

ology, the report stated that he "presented to the commission no evidence of any comparable sales, [and] instead relied upon his characterization of 'just my knowledge of what lots were selling for.'" (J.A. at 141-2.) Paul Payne, the landowner's other expert witness, "used what he characterized as a 'developer's approach.'" (J.A. at 140.) Although Payne did consider comparable sales, he only considered two parcels of land, while Bower and Didden used seven different parcels as examples.

Accordingly, not only did the report specifically credit the testimony of Bower and Didden, but it obviously did so because they were the only valuation witnesses who found the highest and best use of the property was a residential development, not a ski resort, and who also credibly used comparable sales as their method of valuation. Moreover, the significance placed on the respective witnesses' testimony by the Second Commission was neither unreasonable nor without merit.

In its findings of fact, the Second Commission accepted that the highest and best value at the time of taking was for a large lot residential development. The Second Commission determined that the value of the land before the taking was $791,300, the amount stated by Bower. The Second Commission also concluded that the value after the taking was $395,500. Although no expert testified to this exact amount, Bower testified that the value after taking was $580,300. Therefore the Second Commission

obviously adopted a figure which fell between those provided by the two experts it deemed reliable.[9]

---

[9] Falling within a range of testimony adduced at the hearing does not provide conclusive support for the Second Commission's calculations. *Compare United States v. 452.876 Acres of Land*, 667 F.2d 442, 445 (4th Cir. 1981) ("The mere falling between those extreme limits does nothing to make understandable the process by which the commission arrived at its determinations of value.") with *United States v. Certain Parcels of Land, etc.* 384 F.2d 677, 681 (4th Cir. 1967) (upholding the total arrived at by the commission in part because it was well within the range of testimony adduced before the commission): However, in this case, the award fell between the range of testimony of the two Government witnesses upon whom persuasive than merely falling between "the highest appraisal advanced by the landowner and the lowest advanced by the government." 452.876 *Acres of Land*, 667 F.2d at 445.

Accordingly, we find that the Second Commission's report adequately set forth the procedures and reasoning used in calculating the award, and satisfied the standards set forth in *Merz* and its progeny. *See United States v. 403.14 Acres of Land*, 553 F.2d 565, 570 (8th Cir. 1977) ("There is no requirement that such a report be perfect in form or structure or that it be immune from all criticism...."); *United States v. 573.88 Acres of Land*, 531 F.2d 847, 849 (7th Cir. 1976) ("[T]he commissioners are not required to explain the exact thought processes they utilized nor are they required to develop and apply a mathematical formula which can be programmed, computerized and then reviewed by the district court like an algebraic equation.").

This case is easily distinguished from *United States v. 452.876 Acres of Land*, 667 F.2d 442 (4th Cir. 1981), a case in which this court reversed and remanded a condemnation proceeding because the commission's report was inadequate. This court recognized that the commission need not make findings such as a judge, but it found the commission's report lacking in almost every way and "so bare and sparse as to provide no basis for developing whether [its findings] are or are not clearly erroneous." *Id.* at 444. The entire report in *452.876 Acres of Land*, in contrast to this case, was less than one page in length and consisted of five statements, and the district court's order was also unenlightening in ascertaining the anaylsis used for determing the award.[10]

---

[10] The *452.876 Acres of Land* court noted, in dicta, certain elements which would help disclose the path followed by a commission in determining an award. Many of

VI.

For the foregoing reasons, we find no reversible error, and, therefore, affirm the district court's determination of just compensation.

AFFIRMED

---

those elements are found in the Second Commission's report in this case, including: an outline of the testimony of every witness and before and after valuations, rejection of the testimony of several landowner's witnesses, and acceptance of the testimony of certain Government witnesses. *See 452.876 Acres of Land*, 667 F.2d at 444-5 n.10 (quoting *Morgan v. United States*, 356 F.2d 17, 23 (8th Cir. 1966)).

OSTEEN, District Judge, concurring in part and dissenting in part:

Although I concur with my distinguished colleagues that this case must be affirmed on the substantive issues raised by the landowner, I must respectfully dissent on the procedural matters raised by the landowner and addressed by this Court in sections II and II of the majority opinion. Not once, but twice, the fundmanetal fairness and integrity of the land condemnation proceeding was jeopardized. Because I do not find such errors to be harmless, I would reverse for a new determination of just compensation.

I.

"The Just Compensation Clause of the Fifth Amendment, which provides that private property shall not be taken without just compensation, is one of the most basic constitutional guarentees that the rights of the individual will not be unfairly sacrificed in the pursuit of the common weal." United States v. 320.0 Acres of Land, 605 F.2d 762, 768 (5th Cir. 1979). The fourteen year history of this case reveals a paradigm of difficulty. More particular to the issue, in 1990 this Court reversed the determination of just compensation by the first land commission because the district court failed to replace a commissioner biased against the landowner and his counsel. See United States v. Werner, 916 F.2d 175m 179 (4th Cir. 1990).

Subsequently, the parties were given an opportunity to interview potential persons to fill the second land

commission in order to ensure that the commissioners knew nothing of the prior proceedings. However, in the opening paragraph of the Order appointing the second land commission, the district court informed the commissioners of the monetary figure awarded by the first land commission as just compensation. (J.A. at 66.) The landowner immediately moved for a cautionary instruction which would instruct the commissioner's to disregard the prior award. (J.A. at 87.). Notably, the government conceded that it was improper to instruct the commission of the prior award of just compensation, but quibbled with the cautionary instruction proposed by the landowner. (J.A. at 95.) The district court disregarded the Government's concession and denied the motion as "frivolous and wholly without merit." (J.A. at 99.).

Citing only to the rationale that a commission has more expertise than a jury of laypersons as well as the evidentiary responsibilities of a commission, the majority concludes that "commissions and juries are dissimilar entities and, although it may be prejudicial to inform a jury of a prior award in a civil action, the same is not true with regard to a commission." (Slip op. at 7.) While I agree that a commission is granted dual powers of special master and jury, see Fed. R. Civ. P. 71A(h) and 53(c), the reality remains that the commission is the trier of fact. As such, the district court must refrain from interjecting prejudicial remarks which could affect the judgment of the commission, the trier of fact on the issue of just compensation.[1] Because

---

[1] It is well-established that district courts must use great caution in presiding over land condemnation actions. The primary reason for such caution is the involuntary nature of the proceeding to which the landowner is subjected. More particularly, circuit courts have been willing to reverse district courts where the impartiality of the court is questioned, especially when no cautionary instruction is given. *See, e.g., United States v. 158.76 Acres of Land*, 298 F.2d 559, 561 (2d Cir. 1962) (district court's "reference to inflation of the dollar was prejudicial invitation to the jury to be generous to the condemnee"); *United States v. Ham*, 187 F.2d 265, 267 (8th Cir. 1951) (district court's remark favoring the landowner were reversible error since "remarks and conduct of the judge presiding in the trial or assessment of damages before a jury in condemnation cases should be such as will promote a fair and impartial trial"); *Chapman v. United States*, 169 F. 2d

even the Government has conceded that the district court erred by revealing the prior just compensaton award, I will more fully address why the error is not harmless.

The majority of the panel concludes that no prejudice resulted because the second commission's just compensation award was more than that of the first commission. The majority further reasons that the chairman of the second commission was an experienced attorney and the prior award of just compensation appeared in a published decision, and, thus, no harm could have possibly resulted from the district court's error. Under these facts alone, I do not agree that the error was harmless.

641, 644 (10th Cir.) (district court's reference to amount of Government's deposit of estimated just compensation was not prejudicial error *where court provided cautionary instruction, cert denied*, 335 U.S. 860 (1948).

A greater award of just compensation from the second commission does not equal substantial justice and does not erase prejudicial error. The range of evidence of just compensation was from a low of $158,400.00 to a high of $10,785,142.00. Yet, the second commission was informed that the first commission awarded $263,640.00.After six days of complex and varied testimony, the second commission awarded the landowner $395,500.00 as just compensation.

Although the landowner raises a creative and valid argument that the second commission simply increased the previous award by fifty percent, I find even more compelling the fact that the commission adopted the before-taking value of a Government expert, but did not accept the after-taking value or the just compensation calculation of any expert witness. Thus, the second commission disregarded the evidence from both parties in arriving at its own determination of after taking value and just compensation. the majority correctly concludes that there is no indication in the transcripts of the hearing or in the report that the prior award influenced the second commission's decision. However, there is aldo no indication that it did not influence the decision, especially considering that the second commission arrived at a conclusion not supported by expert testimony.

The majority also correctly notes that an attorney acted as chairman of the second commission and should have known to excude incompetent, irrelevant, or inadmissible evidence. More importantly, however, two

other commissioners not trained in the law were required to rely heavily upon the instructions from the district court which included, at the outset, the prior just compensation award. The commissioners were never instructed to disregard the prior award. Land commissioners, like jurors and attorneys and judges, are human beings.[12] There is simply no way of determining whether the commission was prejudiced by the prior award and likewise whether substantial justice was served. In an involuntary system such as a land condemnation

---

[2] Interestingly, Congress has acknowledged the human nature of judges in this same context of being affected by the knowledge of prior pecuniary awards. In districts where arbitration is utilized as an alternative dispute resolution, arbitration awards are sealed by local rule and "shall not be made known to any judge who might be assigned to the case." 28 U.S.C. Sec. 654(b).

proceeding, disputes involving the fairness of a certain judicial procedure should be resolved in favor of the substantial rights of the involuntary litigant especially where, as here, a cautionary instruction would have cured the error. *See Gwathmey v. United States*, 215 F.2d 148, 156 (5th Cir. 1954) (finding that when district court has choice of procedure all reasonable doubt should be resolved in the favor of the landowner's fundamental rights). In this case, the cautionary instruction was requested by the landowner, conceded as an appropriate remedy by the Government, and dismissed as merely frivolous by the district court, Under these circumstances, I do not believe substantial justice was served.

II.

"No person shall be..deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. In principle, due process is the cornerstone of a land condemnation proceeding due to the involuntary nature of the initial taking as well as the subsequent proceeding to award just compensation. In fact, "[t]o bind litigants to rulings on the basis of evidence and arguments they have had no opportunity to contest is the most elementary sort of due process violation." *United States v. 320.0 Acres of Land*, 605 F.2d 762, 780 (5th Cir. 1979) (reversing district court in group of land condemnation actions where evidentiary rulings were made ex parte). It is not the responsibility of

this Court to resolve the merits of the district court's decision to exclude the testimony of the landowner's rebuttal witness. Rather, it is our duty to determine whether the ex parte nature of the district court's ruling deprived the landowner of his due process rights.

As the majority opinion reflects, this dispute arose when the landowner subpoenaed a witness retained by the Government. The Government moved the district court to quash the subpoena and to exclude any "value" testimony of the witness. The Government also requested expedited review and that the landowner's time for response be shortened. (J.A. at 100.) The landowner received copies of the motions late on a Friday afternoon. On the following Monday morning, the landowner faxed the district court a letter requesting that no action be taken until a formal response was filed. The landowner

also requested by the matter be left to the jurisdiction of the land commission. (J.A. at 107-08.) On Tuesday, the landowner mailed his response, However, that same day, the district court issued two ex parte orders granting the Government's motions in full. (J.A. 109-12).

Preventing the landowner from acquiring an opportunity to be heard is the most serious type of due process violation. *See 320.00 Acres of Land*, 605 F.2d at 780 (while denial of opportunity to be heard was unintentional, the due process violation remained reversible error). Further, in this case, such a seemingly intentional act does not constitute harmless error. While the majority focuses on the merits of the landowner's motion to subpoena the Government's witness and the supervisory power of the district court, the ultimate issue centers on an opportunity to be heard. Regardless of the merits of his position, the landowner had a right to be heard, especially when the question before the district court was whether exceptional circumstances existed to allow the subpoena. See J.A. at 110. The district court determined that exceptional circumstances did not exist after hearing only from the Government. *Id.* By entering two *ex parte* orders in the face of the landowner's request to be heard, the district court effectively denied the landowner, an involuntary litigant, a substantial right.

III.

Upon review of this same case during its first appearance in this Court, the Fourth Circuit through a panel

of Judges Butzner, Russell, and Wilkins opined that "[p]ublic confidence in the fairness of a proceeding is important at all levels, including local tribunals established to determine just compensation following condemnation of property pursuant to the government's eminent domain power." *Werner*, 916 F.2d at 178. After fourteen years, the landowner will now receive what we ask him to accept as just compensation. I dare say that he finds no confidence in the fairness of our procedures. While it is not necessary that litigants agree with the final award, it is necessary that the final award in reality and perception be based upon a foundation of fairness. While I understand the realities of crowded dockets and scarcity of judicial resources, I find the results here to be a compromise of this most basic principle.

For the foregoing reasons, I believe the landowner is entitled to a new determination of just compensation. Therefore, I dissent.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA
Plaintiff,

v. CIVIL ACTION NO. 80-0007-M
(Maxwell)

175.76 ACRES OF LAND, MORE OR
LESS, SITUATE IN THE COUNTY OF
JEFFERSON, STATE OF WEST VIRGINIA,
AND ROBERT STANTON WERNER, et al.,
Defendants.

ORDER

Following a lengthy procedural history in the above-styled action, as second Land Condemnation Commission,[1] earlier appointed by this Court, filed its Report concerning the just compensation for the above described tract of land on October 24, 1991. Defendant Werner (landowner), by counsel, filed objections to the Report on November 1, 1991, contesting the just compensation figure determined and reported by the Commission. Plaintiff filed its response to the objections on November 18, 1991. Following submissions by both parties

---

[1] On October 6, 1982, this Court appointed a Land Condemnation Commission which filed its Report on June 12, 1985. This Court adopted said Report on November 17, 1988. Landowner appealed the award and, on November 7, 1990, the United States Court of Appeals for the Fourth Circuit reversed and remanded the November 17, 1988 Order on the issue of this Court's earlier denial of landowner's motion to replace one of the Commissioners.

concerning filing of the transcripts of the Commission proceedings, landowner, on March 26, 1992, submitted a supplemental memorandum in support of objections to the Commission Report, to which Plaintiff submitted its response on April 17, 1992. Matters before the Court in the above-styled action are ripe for consideration.

The federal government took, in fee simple, title tot he above-described land for uses of and concerning the Appalachian National Scenic Trail. The property is located in the Harpers Ferry District, Jefferson County, West Virginia. The matter was referred, pursuant to Fed.R.Civ.P. 71A, to a three person commission, appointed by this Court, to determine the matter of just compensation. The Commission subsequently filed its Report, which is considered a report of a special master in a non-jury case pursuant to Fed.R.Civ.P. 53(e)(2).

Landowner raises many objections tot the Commission Report and this Court's actions which allegedly compromised the Commission's ability to render a just decision. Landowner's chief objection is that the Commission failed to properly consider and include, in their accounting of the highest and best use value, the potential of the above-described land as a location for a ski resort. Landowner claims the decision of the second appointed Commission is erroneous, arbitrary and capricious, and based upon the legally insufficient instructions of this Court.

The standard of review under Rule 53 (e) (2) is: "[in an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous." The United States Supreme Court held in U.S. v. Merz, 376 U.S. 192 (1964), that, in

order for the district court to meaningfully review a land commission's report for clear error, the report must be sufficiently detailed as to show the path followed by the commissioners in reaching the amount of their award. Id. at 199.

The United States Court of Appeals for the Fourth Circuit decision which reversed and remanded this Court's adoption of the first Commission Report filed in this action, warrants partial quotation.

[the primary task of a land commission is to determine the value of the land on the date of taking. As with the factual findings of special masters, factual findings made by a land commission as tot he value of the land are reviewable under the clearly erroneous standard. (citations omitted)

U.S. v. Werner, 916 F.2d 175, 178 (4th Cir. 1990). It is the function of the Commission, not the Court, to weigh questions of the credibility of witnesses or the weight to be given to their testimony. See U.S. v. 9.20 Acres in Polk County, Iowa, 938 F. 2d 1123 (8th cir. 1981).

Landowner contests the credibility of the certain witnesses and the weight given by the Commission to their testimony. A determination of the credibility of witnesses and the weight to be given to their testimony is not for this Court to decide. See Merz, at 198. An objection reading of the Commission Report clearly shows the path taken and which line of testimony the Commission relied on why in arriving at the value of just compensation. The Commission's decision to credit the testimony regarding the value of the property of Plaintiff's expert witness over the testimony of landowner's expert witnesses is not

erroneous. The Report is well-grounded on credible evidence which is in the record.

Upon consideration of landowner's objection to the Land Condemnation Commission Report and all other materials made part of the record in this action, it appears the findings in the Report are not erroneous.[2] Review of the Report clearly reveals a reasonable explanation for its findings. Accordingly, it is

ORDERED that the Report of the Condemnation Commission be, and the same is hereby, ACCEPTED, ADOPTED, and APPROVED by the Court.

Therefore, it is

ORDERED that the just compensation for the interest taken in the above-cited tract of land is THREE HUNDRED NINETY-FIVE THOUSAND FIVE HUNDRED DOLLARS ($395,500.00).

If landowner should desire to appeal the decision of this Court, written notice of appeal must be received by the Clerk of this Court within sixty (60) days from the dated of the entry of the Judgment Order, pursuant to subsection (a) (1) of Rule 4, Federal Rules of Appellate Procedure. The $5.00 filing fee should also be submitted with the notice of appeal. In the alternative, at the time the notice of appeal. In the alternative, at the time the notice of appeal is submitted, landowner may, in accordance with the provisions of Rule 24(a), Federal Rules of Appellate Procedure, seek leave to proceed in forma pauperis from the United States

---

[2] The Court acknowledges but dispenses with discussion of landowner's objections regarding this Court's Instructions to the Commission. Suffice it note that the Instructions fully protect, constitutionally, the interests of landowner.

Court of Appeals for the Fourth Circuit.

ENTER: April 14th 1993.

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA
Plaintiff,

v. CIVIL ACTION NO. 80-0007-M
(Maxwell)

175.76 ACRES OF LAND, MORE OR
LESS, SITUATE IN THE COUNTY OF
JEFFERSON, STATE OF WEST VIRGINIA,
AND ROBERT STANTON WERNER, et al.,
Defendants.

ORDER

The United States of America filed a declaration of taking on February 5, 1980 thereby acquiring the above-mentioned tract of real estate situate in Jefferson County in the Northern District of West Virginia.

The United States District Court for the Northern District of West Virginia entered an order on the 11th day of July, 1991 forming a commission pursuant to Rule 71A(h), Federal Rules of Civil Procedure, to determine the issue of just compensation for the real estate taken by the United States.

The commission was instructed pursuant to the requirements of Rule 71A and each commissioner executed the Land commissioner's Oath submitted to them in connection with their duties as land condemnation commissioners. On the 10th day of September 1991, the land commissioners conducted a view of the premises condemned and the chairman of the commission conducted a pre-hearing conference on September 10, 1991, pursuant to notice

to all interest parties. The pre-hearing conference was attended by the land owner, his counsel and attorneys for the United States government.

Pursuant to notice to all interested parties, the matter as brought on for hearing on September 11, 1991 and evidence was heard on September 11, 12, 13, 16, and on October 8 and 9, 1991, at which time, all parties rested. The United States was represented at the hearing by Joy Ryan, Esquire, and Michael K. Baker, Esquire, from the Department of Justice and the defendant landowner was represented by R. Edwin Brown, Esquire, of the law firm of Brown & Strum of Rockville, Maryland.

EVIDENCE PRESENTED

Robert Stanton Werner, the landowner, testified that as of the date of the taking, February 5, 1980, the highest and best use for the property was for development as a commercial winter resort; that the fair and reasonable market value of the entire tact of land consisting of 596 acres, more or less, owned by Mr. Werner, was Eleven Million Dollars ($11,000,000.00); that the highest and best use of the residue of the property after the taking was for residential development into two acre lots and that the fair and reasonable market value of the portion of land remaining after the take was Two Hundred Fourteen Thousand Eight Hundred Fifty-Eight Dollars (214,858.00), which formed the basis for his opinion as to just compensation in the amount of Ten

Million Seven Hundred Eighty-Five Thousand One Hundred Forty-Two Dollars ($10,785,142.00).

Mr. Paul Payne of Hedgesille, West Virginia, testified as a real estate expert on behalf of the landowner. Mr. Payne opined that the highest and best use before the taking by the government of the entire tract was for a recreational and residential subdivision and that the highest and best use of the residue following the taking is for a large lot subdivision. He further opined that the fair market value for the entire tract prior to the taking was One Million Five Hundred Eight-Seven Thousand Three Hundred Thirty-Four Dollars ($1,587,334.00) and that the fair and reasonable market value of the portion that remains after the taking is three Hundred Twenty-Seven Thousand Dollars ($327,000.00) and further opined that just compensation to the landowner would be the sum of One Million Two Hundred Sixty Thousand Three Hundred Thirty-Four Dollars ($1,260,334.00). Mr. Payne used what he characterized as a "developer's approach" in arriving in his opinions as to the fair and reasonable market value of the land taken by the government, although he did consider tow parcels of land as comparable sales.

Mr. WIlliam F. Malcolm Jr. of Lyme, New Hampshire, testified as an expert witness for the landowner on the feasibility and evaluation of the property for ski development. He opined that the fair and reasonable market value of the land prior to the taking by the United States government was Eight Million Three Hundred Forty Thousand Dollars ($8,340,000.00) and that the

fair and reasonable market value of the portion of the land that remains after the taking was Three Hundred Thirty Thousand Dollars ($330,000.00) in arriving at his opinion of Eight Million Ten Thousand Dollars ($8,010,000.00) for just compensation. Mr. Malcom's appraisal methodology that should be pointed out was not in accordance with the instructions to the commissioners, specifically Instruction No. 4 Value as a Whole found on page 10 of the Instructions, and was not the type of factual information upon which the commission could rely.

Mr. C. William Hensell of Martinsburg, West Virginia testified on behalf of the landowner as a real estate expert. He opined that the highest and best use before the taking was for residential development and the highest and best use following the taking was for development in three to five acre residential market value of the entire tact of land immediately before the taking was Two Million Eighty-Seven Thousand Three Hundred Thirty Dollars ($2,087, 330.00) and that the fair and reasonable market value of the portion that remained after the taking was Four Hundred Twenty Thousand Sixty-Two Dollars ($420,062.00), thereby arriving at his opinion as to just compensation of being One Million Six Hundred Sxity-Seven Thousand two Hundred Sixty-Eight Dollars ($1,667,268.00). Mr. Hensell testified that he was using comparable sales as his methodology, but presented to the commission no evidence of any comparable sales, but instead relied upon

his characterization of "just my knowledge of what lots were selling for."

Following Mr. Hensell, the landowner rested.

Upon conclusion of the landowner's case, the government presented Mr. Bruce Closser of Marquette, Michigan, who qualified as an expert witness as a real estate appraiser with specialty in ski area appraisals. He testified that the required factors for highest and best use to be a ski resort are: (1) legal, (2) the physical possibilities (slope, climate, etc.) and (3) financial feasibility's; that if any of the three critical factors is not feasible, the chance of success is greatly diminished and therefore a ski resort cannot be deemed it s highest and best use. He opined that the slope of the property was acceptable but not ideal; that the aspect (or the direction which the slope faces) was probably acceptable but due to its northwest to west-northwest orientation, it would probably require additional snowmaking and additional grooming; that the space is adequate for a main base facility; that the general access to the area as a ski resort was very good but that the local road would cause bottlenecks and thereby impede access to the property; that the availability of extraordinarily high due to minimum charges in the region for electricity high due to minimum charges in the region for electricity for on-demand services, for which he placed a figure of Twenty-Six Thousand Dollars ($26,000.00) a month as a minimum; that snowmaking, which was the most critical factor for a successful operation in this area of the country,

required: (1) water, (2) compressed air and (3) proper temperatures; that vast amounts of water were needed and that the climate required sufficient hours under 28 before December 15, of each year for successful operation; that he found no good sources of water available. He testified that there were no ski areas in the southeast which relied upon wells for water supply and that no informed purchaser would buy property for development of a ski resort without assurances of water. He further opined that the property failed due to the climate factor; that is, that the property did not lend itself to being able to make enough snow early enough in the season when it is crucial for the success of the facility. Mr. Closser therefore concluded that the highest and best use of the property was not a ski area.

the government next produced Mr. Thomas Merchant McDonald, an expert witness in civil engineering. Mr. McDonald testified that he had reviewed the Jefferson County subdivision regulations which were in effect at the time of the taking together with the plans for the ski resort which had been developed by Mr. Werner. In his opinion, the plans developed for the landowner were inadequate in several respects.

Mr. Richard L. Bowers of Hagerstown, Maryland, testified as an expert real estate appraiser for the government. Mr. Bowers testified that the highest and best use before the taking was for future development of a large lot subdivision and was the same following the taking. He testified that the market value of the entire tract of land immediately before the taking

was Seven Hundred Ninety-One Thousand Three Hundred Dollars ($791,300.00) and that the fair and reasonable market value of the portion that remained after the taking was Five Hundred Eighty Thousand Three Hundred Dollars ($580, 300.00), thereby arriving at this opinion of just compensation for the real estate taken of Two Hundred Eleven Thousand Dollars ($211,000.00). Mr. Bowers used the market data and direct sales approaches in arriving at his opinions and provided to the commission seven examples of comparable sales, upon which the commission relied heavily in its decision.

Mr. John S. Kusner, a licensed land surveyor, subdivision planner and real estate broker, now living in Peru, South America, next testified on behalf of the government. Mr. Kusner had been employed in prior years by the landowner to develop a plan for the real estate, first as a large lot development and later as a ski resort. He indicated that the Jefferson County Planning Commission had made it very, very difficult for development during the time period leading up to the taking by the government, particularly as it related to Mr. Werner's property, due to its proximity to Harpers Ferry. He opined that intensive development would have been severely hampered by the Planning Commission.

Mr. Gregory Didden of Shepherdstown, West Virginia, testified as an expert in real estate appraisal and marketing in Jefferson County, West Virginia. Mr. Didden used the comparable sales approach to value and provided to the commission, seven

examples of such sales that he used in his analysis, upon which the commission relied heavily in its decision. He opined that at the time of the take, that the real estate market in Jefferson County was to good for small lot subdivisions due to the fact that central sewage was not cost effective and that therefore, in his opinion, the highest and best use for the property prior to the take was for five acre residential lot sales, and that the residue would have a similar highest and best use following the taking. He further opined that the fair and reasonable market value of the entire tract of land immediately before the taking was Five Hundred Twenty-Six Thousand Five Hundred Dollars ($526,500.00) and that the fair and reasonable market value of the portion that remains after the taking was Three Hundred Seventy Thousand Eight Hundred Dollars ($370,800.00) and further opined that just compensation for the property taken by the government as of the date of taking, after a slight adjustment was One Hundred Fifty-Eight Thousand Four Hundred Dollars ($158,400.00).

At the conclusion of Mr. Didden's testimony, the government rested its case.

The landowner followed by presenting Dr. Richard Berry of West Chester, Pennsylvania, in rebuttal. Dr. Berry qualified as an expert geologist and specifically testified as to his opinion as to the adequacy of the water supply on the subject property in order to supply a sufficient amount of water in order to operate a ski resort. Dr. Berry testified that it was undisputed

and undeniable that the source of water was adequate for this purposes based upon his opinion that there was fault zone on the property which indicated direct proof of fracturing which should supply vast volumes of water. His opinion was challenged by the government and the witness conceded that none of the studies which had been done previously could indicate that there was a fault on the property and that there was o indication of a fracture on the 1991 geology map of the region.

Mr. Wallace B. Shank, Sr., of Emmitsburg, Maryland, testified as an expert witness in rebuttal on ski area management. He opined that the region around Harpers Ferry was not dissimilar to his operations at Ski Liberty and Ski Roundtop, and that the successes in these two areas would indicate to him that the Harpers Ferry area did lend itself to snowmaking.

Mr. Manfred Locher, the general manager of the Bryce Skiing Resort at Bayse, Virginia, testified that in his opinion the Harpers Ferry location was not dissimilar to the Bryce Resort location which had been profitable each year since 1966 for skiing and enjoyed a skiing year from mid-December to early March.

Following Mr. Locher, Mr. Emmitt Abbott, a well driller, presented evidence as to the future anticipated use of a well as the water source for snow making purposes at White Tail Resort, which was not yet in operation. Mrs. Irene G. Speaks, a co-owner of Keys Ferry Acres, which is located in close proximity to the Werner property, testified that their subdivision

contained one hundred and forty-eight (148) homes served by a water system supplied by wells.

Mr. Timothy J. Town is the owner of a water company for Westridge Hills, which adjoins the Werner property. Mr. town testified that Westridge Hills water company was served by a well which had an abundant supply of water. He characterized this well as "a lake".

The commission next accepted into evidence over objection by the government, the transcribed testimony of Mr. John Holtz before the land commission on June 21, 1984. It was represented to the commission that Mr. Holtz is now deceased and the substance of his testimony was that the climate in the Harpers Ferry area lent itself adequately for skiing.

Mr. Eric Adamson testified that he was the general partner of Rappahannock Ski Area near Front Royal, Virginia, which had operated until 1974 when it was closed and never reopended. Mr. .Adamson was presented as a witness for purposes of testifying that the Rappahannock Ski Area did not fail because it could not make snow, but instead did not reopen due to zoning problems and economic factors.

The landowner, Mr. Werner, then testified in rebuttal in support of his position that the highest and best use of the property was for a commercial ski resort. The final rebuttal witness presented by the land owner was Mr. Lee Snyder, of Shenandoah Junction, West Virginia, the President of Snyder Environmental Service, Inc., who testified that in a regulatory

sense, the approval to discharge five hundred thousand gallons of effluent a day made the sewage plan for Mr. Werner cost effective and feasible and further opined that the water systems as planned was feasible.

The landowner then rested as to its rebuttal testimony and the government presented two additional surrebuttal witnesses. The first of such witnesses was Mr. Gregory Didden, who had previously testified that two dry holes had been drilled at the depth of five hundred feet and that a third well, five hundred and seventy-five feet deep, provided only one gallon per minute of water in wells drilled at Shenandoah Overlook , which adjoins the Werner property.

Finally, Mr. Williams K. Jons testified as an expert hydrogeologist. His testimony was contrary to dr. Berry's opinion as to whether or not there was fault running across the Werner property and further opined that there was not an adequate water supply on the property to support snowmaking.

At the conclusion of all of the testimony, counsel for the parties were permitted an opportunity to argue their respective positions and the hearing was concluded.

Following the hearing, the commission met separately and considered the evidence which had been presented. The commission considered the Court's instructions relating to highest and best use, fair market value, just compensation and all other matters on which the commission had been instructed and which had

been introduced into evidence. In arriving at its findings, the Commission utilized comparable sales as its standard of value approach. The commission rejected the position of the land owner as to highest and best use and in so doing, were influence by the evidence, that of all the fair market value experts who testified for the landowner and the government, not one opined in favor of a winter ski resort.

The commission makes the following findings of fact:

(1) That prior to the taking, the landowner was seized and possessed of a tract of real estate in Jefferson County, West Virginia containing 596 acres, more or less;

(2) that the date of the taking of the subject property was February 5, 1980;

(3) that the property taken is 175.76 acres of land, more or less, and is a partial taking;

(4) that the residence of the original 596 acre tract of land after the taking consists of 420.23 acres, more or less;

(5) that the property taken by the government can be characterized as having spectacular view of Jefferson County, West Virginia, the town of Harpers Ferry, and Loudoun County, Virginia, and is the most valuable acreage of the 596 acre tract of land;

(6) that the highest and best use of the property at the time of the taking was for large lot residential development;

(7) that the fair and reasonable market value of the entire tract of land immediately before the taking was Seven Hundred Ninety-One Thousand Three Hundred Dollars ($791,300.00) and that the fair and reasonable market value of the portion that remains after the taking was Three Hundred Ninety-Five Thousand Five Hundred Dollars ($395,500.00) as shown by the evidence;

(8) that "just compensation" or the fair and reasonable market value of the land taken by the government as of the date of the taking was Three Hundred Ninety-Five Thousand Five Hundred Dollars ($395,500.00).

The commission having made the above findings of fact, recommends to the Court that they be accepted.

Respectively submitted this 17th day of October, 1991, with copies to all interest parties. Any party objecting to the report is directed to file its objection within ten (10) days.

_____
Richard L. Douglas, Chairman

_____
James Davis, Commissioner

_____
Arch R. Hoxton, III, Commissioner

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA
Plaintiff,

v. CIVIL ACTION NO. 80-0007-M
(Maxwell)

175.76 ACRES OF LAND, MORE OR
LESS, SITUATE IN THE COUNTY OF
JEFFERSON, STATE OF WEST VIRGINIA,
AND ROBERT STANTON WERNER, et al.,
Defendants.

ORDER

On February 12, 1991 the Court received a request for the addition of five instructions regarding the retrial of the above styled land condemnation from the Defendants. An additional requested instruction was filed on March 6, 1991. All of the alternative instructions have been adopted and used by the United States District Court for the District of Maryland. On February 27, 1991 the Plaintiff submitted an Opposition to Defendants' Proposed Instructions for Commissioners. Defendants' Response was filed March 11, 1991.

A careful review of the proposed instructions reflect that the Defendants do not challenge the legal contents of the prior instructions in this case. Defendants' instructions merely reflect a preference for the more familiar Maryland

passages. While the proposed instructions are somewhat more detailed in certain respects, this Court's prior instructions accurately and completely inform the Commissioners regarding the proper considerations in land condemnation proceedings. Additionally, the prior instructions in no way prohibit the presentation of the issues contained in Defendants' proposed instructions. It is accordingly

ORDERED that Defendants' Request for the adoption of the proposed instructions be, and the same is hereby, DENIED. It is further

ORDERED that the Clerk of Court direct a copy of the previous instructions tot all parties of record.

ENTER: July 10th, 1991

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA
Plaintiff,

v. CIVIL ACTION NO. 80-0007-M
(Maxwell)

175.76 ACRES OF LAND, MORE OR
LESS, SITUATE IN THE COUNTY OF
JEFFERSON, STATE OF WEST VIRGINIA,
AND ROBERT STANTON WERNER, et al.,
Defendants.

ORDER

On October 16, 1990 the above-styled civil action was remanded back to this Court by the United States Court of Appeals for the Fourth Circuit after the reversal of this Court's Judgment Order dated November 17, 1988 determining just compensation to be $263,640.00 The Fourth Circuit reversed this determination due to this Court's failure to replace one of the three appointed land commissioners, who was declared to be interested in the outcome of the case.

Pursuant to Rule 71A(h), Federal Rules of Civil Procedure, this Court on November 18, 1990 sent notice to all interested parties that three men, Richard L. Douglas, James Davis, and Arch R. Hoxton, III, were being considered for appointment to serve as land commissioners in this action. After Defendants requested an opportunity to examine the proposed land commissioners, this Court by Order dated January 7, 1991 arranged for this examination to take

place on February 4, 1991. This Order clearly stated that Defendants had thirty (30) days during which to not objections to the proposed commissioners. A review of the record of this case establishes that no objections were made during this period.

Accordingly, it is

ORDERED that a commission be formed for the purpose pursuant to Rule 71A(h), Federal Rules of Civil Procedure. The commission shall be made up of the following three members:

1) Richard L. Douglas, Chairman, of Martinsburg, WV;

2) James Davis of Ranson, WV; and

3)Arch R. Hoxton, III, of Sherpherdstown, WV.

For their services in this matter, the commission members shall be entitled to the sum of $50.00 per hour, not to exceed $289.41 per day, subject to any increases in this rate of compensation which may occur during their tenure, while engaging in viewing the land, conducting evidentiary hearing, and such other activities as shall be approved by the Court.

The Court instructs the commissioners to be mindful of the Court's "Instructions to Land Condemnation Commissioners Under Rule 71A" and the "Land Commissioner's Oath" submitted to them in connection with their duties as land condemnation commissioners. The Clerk of this Court is directed to filed and make a part of the record in this action the Instructions of the Court and Oaths executed by each commissioner, both mentioned above. The Clerk is further directed to furnish a certified copy of this Order to each member of the commission.

The commissioners shall file their oaths with the Clerk by August 16, 1991. The Report of the commission is to be submitted by January 17, 1992, at which time the appointment of the commission members shall terminate unless the Court otherwise directs.

ENTER: July 11th, 1991.

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA
Plaintiff,

v. CIVIL ACTION NO. 80-0007-M
(Maxwell)

175.76 ACRES OF LAND, MORE OR
LESS, SITUATE IN THE COUNTY OF
JEFFERSON, STATE OF WEST VIRGINIA,
AND ROBERT STANTON WERNER, et al.,
Defendants.

ORDER

On July 11, 1991 the Court entered an Order appointing new land commissioners in this action and supplying them with copies of applicable instructions. Defendants submitted a motion on July 22, 1991 asking for a cautionary instruction on the basis of the Court's disclosure of a prior award in this action. The prior award is a matter of public knowledge having been detailed in a decision of the United States Court of Appeals for the Fourth Circuit. In light of the above, and the prior instruction of the land commissioners regarding the proper basis for an award, it is apparent to the Court that Defendant's motion is frivolous and wholly without merit. Therefore, it is

ORDERED that Defendant's motion be, and the same is hereby, DENIED.

ENTER: August 30, 1991.

_____
United States District Judge

Supreme Court, U.S.
FILED
APR 7 1995
OFFICE OF THE CLERK

No. 94-1351

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT STANTON WERNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

JOHN A. BRYSON
JACQUES B. GELIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court violated petitioner's right to due process when in the order appointing a land commission, under Fed. R. Civ. P. 71A(h), the court referred to the dollar amount of a since-vacated award made by a previous commission, which amount had previously been disclosed in a published Fourth Circuit opinion.

2. Whether the district court committed reversible error by issuing *ex parte* an order preventing petitioner from deposing or introducing at trial the testimony of a government-designated valuation witness, when at the time petitioner subpoenaed that witness the discovery period had closed, and petitioner and the government had already finished presenting their respective cases in chief.

3. Whether the district court erred in refusing to give certain valuation and evidentiary instructions requested by petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Alabama Power Co. v. *1354.02 Acres*, 709 F.2d 666 (11th Cir. 1983)	8
Cade v. *United States*, 213 F.2d 138 (4th Cir. 1954)	10
Morton Butler Timber Co. v. *United States*, 91 F.2d 884 (6th Cir. 1937)	10
United States v. *Merz*, 376 U.S. 192 (1964)	2, 6-7
United States v. *Meyer*, 113 F.2d 387 (7th Cir.), cert. denied, 311 U.S. 706 (1940)	10
United States v. *91.90 Acres of Land*, 586 F.2d 79 (8th Cir. 1978), cert. denied, 441 U.S. 944 (1979)	10, 13
United States v. *Piche*, 981 F.2d 706 (4th Cir. 1992), cert. denied, 113 S. Ct. 2356 (1993)	6
United States v. *320.0 Acres of Land*, 605 F.2d 762 (5th Cir. 1979)	8
United States v. *2.33 Acres of Land*, 704 F.2d 728 (4th Cir. 1983)	13
United States v. *Werner*, 916 F.2d 175 (4th Cir. 1990)	2, 9

Rules:

Fed. R. Civ. P.:	
Rule 53	2
Rule 53(c)	8
Rule 61	8
Rule 71A(h)	2, 5, 8

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1351

ROBERT STANTON WERNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is unpublished, but the decision is noted at 36 F.3d 1095 (Table). The order of the district court adopting the report of the land commission (Pet. App. 42a-46a) is reported at 818 F. Supp. 167. The report of the land commission (Pet. App. 47a-59a) is unreported. An earlier opinion of the court of appeals is reported at 916 F.2d 175.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1994. A petition for rehearing was denied on October 13, 1994. The petition for a writ of certiorari was filed on December 28, 1994. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 5, 1980, the United States filed a complaint in condemnation to acquire fee title to 175.76 acres of a 596-acre tract in Jefferson County, West Virginia, owned by petitioner, for use as part of the Appalachian National Scenic Trail. Petitioner's property consists of mountainous land located across the Shenandoah River from Harpers Ferry. Pet. App. 3a-4a.

2. On October 6, 1982, the United States District Court for the Northern District of West Virginia appointed a three-person commission, pursuant to Fed. R. Civ. P. 71A(h), to determine just compensation for the condemned land.[1] After a hearing, the commission filed a report awarding petitioner $263,640, which the district court adopted. Pet. App. 4a. The court of appeals, however, reversed the judgment and remanded for a new hearing, finding that one of the commissioners should have been disqualified for bias. See *United States* v. *Werner*, 916 F.2d 175 (1990).

3. On July 11, 1991, the district court issued an order appointing a new land commission, and

---

[1] Under Rule 71A(h), the district court in a condemnation proceeding may, in its discretion, "because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice," appoint a commission of three persons, in lieu of a jury, to determine just compensation. When such a commission is appointed, it is invested with the powers provided a special master under Fed. R. Civ. P. 53. See generally *United States* v. *Merz*, 376 U.S. 192 (1964).

providing to it the same instructions previously given to the first commission. Pet. App. 62a-64a. In the course of explaining the necessity for the commission, the order referred to the Fourth Circuit's reversal of the earlier commission's award on grounds of bias. *Id.* at 62a. Petitioner objected to the order's reference to the dollar amount of the prior award, and requested that the court give a cautionary instruction prohibiting the second commission from relying on the amount of the first award. *Id.* at 65a. The court declined, reasoning that because the amount of the initial award had been published in the Fourth Circuit opinion, it was "a matter of public knowledge." *Ibid.* Moreover, the court stated, there was no harm in the second commission's knowing the amount of the vacated award, because the commission had been instructed adequately as to the grounds on which it must base its own independent determination. *Ibid.*

4. By order of the second commission, each party was limited at trial to four valuation witnesses. In petitioner's case in chief, petitioner and William Malcolm, an expert real estate witness, both testified that the highest and best use of the land before the taking was as a ski resort; that the best use after the taking was for residential development; and that just compensation was between $8,010,000 and $10,785,142. The other witnesses called by petitioner testified that the best use of the land before the taking was for recreational and residential development, and that the best use after the taking was for residential subdivision, yielding just compensation estimates of $1,260,334 and $1,667,268. Pet. App. 6a.

The government presented two valuation witnesses. Each testified that the highest and best use

of the land both before and after the taking was for residential development. One said that just compensation was $211,000. The other contended that just compensation was $158,000. Pet. App. 6a-7a.

5. After four days of testimony, the parties concluded their direct cases, and the commission took a three-week recess before returning for the final two days of rebuttal. During that recess, petitioner subpoenaed William Bowen, a real estate appraiser who had been identified as a potential government witness, but who had not been called to testify. The government moved to quash the subpoena, filed a motion *in limine* to prevent petitioner from introducing Bowen's testimony as to value, and submitted a letter to the court requesting an expedited ruling. The court granted the government's motions *ex parte*, on the grounds that the time for discovery elapsed when the trial began, and that petitioner had already presented the maximum number of valuation witnesses permitted by the commission. Pet. App. 5a, 7a-8a.

6. On October 24, 1991, the commission filed its report, Pet. App. 47a-59a, summarizing the testimony offered by both parties, and setting forth detailed findings of fact. The commission expressly rejected petitioner's contention that the highest and best use of his property was as a ski resort, and found that the highest and best use of the tract was for large lot residential development.[2] The report concluded that

---

[2] The government had presented at the hearing substantial evidence that, because of its climate and the absence of a plentiful water supply, petitioner's property could not feasibly be used for a ski resort. Pet. App. 51a-52a, 57a. In rejecting the landowner's position, the commission noted that "of all the fair market value experts who testified for the landowner

the pre-taking market value of the property was $791,300; that the post-taking value of the remaining portion was $395,500; and that just compensation was $395,500. The district court denied petitioner's objections to the report, and adopted the award of the commission. *Id.* at 8a-9a.

7. The court of appeals affirmed. Pet. App. 1a-41a. The court held, first, that the district court did not commit reversible error (and to the extent that there was error, it was harmless) when it informed the second commission of the dollar amount of the award determined by the first commission. *Id.* at 12a-13a. The court rejected petitioner's analogy of a commission to a jury, noting that, under Rule 71A(h), "[a] commission has the authority to regulate the proceedings held before it * * * as well as serving as the finder of fact." Pet. App. 12a. Because the commission was empowered to rule on the admissibility of evidence, and had been instructed to disregard any evidence it found "incompetent, irrelevant, or legally inadmissible," it was to be expected that the commission would hear—and decline to consider—a modicum of improper evidence, such as the amount of the prior commission's award. *Ibid.* Moreover, the court noted, the award made by the second commission was $131,860 greater than the award made by the first commission, and there was no indication in the record that the amount of the second award was in any way influenced by the amount of the first. *Id.* at 13a-14a.

The court of appeals also rejected petitioner's argument that the district court exceeded its juris-

---

and the government, not one opined in favor of a winter ski resort." *Id.* at 58a.

diction and violated due process when it granted the government's motions to quash the Bowen subpoena and prevent petitioner from calling Bowen to testify as to value at the hearing. The court expressed doubt that the district court had acted improperly in failing to defer to the commission on matters relating to the subpoena, but held that to the extent that the district court had erred procedurally, the error was harmless. Because petitioner subpoenaed Bowen after the discovery period had closed, and after petitioner had finished presenting his four allotted valuation witnesses, it was simply too late for petitioner to depose Bowen or to introduce Bowen's testimony in petitioner's case in chief. Pet. App. 15a-16a.

In addition, the court of appeals rejected petitioner's challenge to the instructions given by the district court. Noting at the outset that "[t]he district court has considerable discretion in choosing the specific wording of instructions," Pet. App. 17a (quoting *United States* v. *Piche*, 981 F.2d 706, 712 (4th Cir. 1992), cert. denied, 113 S. Ct. 2356 (1993)), the court concluded that the instructions given in this case were satisfactory, see Pet. App. 17a-20a. Moreover, it held, because the instructions given to the second commission were identical to those given to the first, petitioner's failure to object to those instructions at the time of the initial hearing constituted a waiver. *Id.* at 16a-17a.

Finally, the court rejected petitioner's claim that the valuation by the commission was clearly erroneous. Pet. App. 20a-28a. As the court explained, *id.* at 21a-23a, the commission's report adequately set forth the bases for its findings of fact and its just compensation award, thereby satisfying the standards established in *United States* v. *Merz*, 376

U.S. 192 (1964). The commission's report provided "an exhaustive account of the evidence presented at the hearing, * * * summariz[ed] the testimony of every witness, and, quite significantly, indicat[ed] both the testimony upon which the [commission] primarily relied in making its findings as well as its reasons for accepting such testimony." Pet. App. 23a-24a. The report made clear that the commission rejected petitioner's claim that the tract's highest and best use was as a ski resort, *id.* at 25a, and "credit[ed] the testimony of [the government witnesses] * * * because they were the only valuation witnesses who found the highest and best use of the property was a residential development, not a ski resort, and who also credibly used comparable sales as their method of valuation," *id.* at 26a.

Judge Osteen agreed with the majority that petitioner's substantive objections lacked merit, but he dissented as to certain procedural matters. In his view, the district court erred when it informed the second commission of the dollar amount of the first commission's award, and when it granted *ex parte* the government's motion to quash and motion *in limine*. Pet. App. 30a-41a.

ARGUMENT

The decision of the court of appeals in this case was correct, and it does not conflict with any decision of this Court or of any other court of appeals. Petitioner's fact-bound objections raise no issue of general application and do not otherwise merit further review.

1. Petitioner argues (Pet. 8-9) that the district court violated his due process rights when it informed the second commission of the dollar amount

awarded by the first commission and refused subsequently to give a curative, cautionary instruction. That argument is without merit.

A commission is chosen in complex cases requiring greater expertise and knowledge than that possessed by laypersons. See Fed. R. Civ. P. 71A(h); *Alabama Power Co.* v. *1354.02 Acres*, 709 F.2d 666, 667-668 (11th Cir. 1983); *United States* v. *320.0 Acres of Land*, 605 F.2d 762, 828 (5th Cir. 1979). Unlike a jury, a commission has the powers afforded a special master under Fed. R. Civ. P. 53(c). A commission, therefore, is not only the finder of fact, but in addition has the authority to regulate the proceedings before it, including the power to rule on the admissibility of evidence and the duty to refrain from considering evidence found to be inadmissible. In light of the comprehensive adjudicatory role of the commission, the court of appeals correctly found (Pet. App. 12a-13a) that "commissions and juries are dissimilar entities and, although it may be prejudicial to inform a jury of a prior award in a civil action, the same is not true with regard to a commission."

Moreover, even if the district court had erred when it informed the second commission of the prior award, its reference to the prior award was harmless. See Fed. R. Civ. P. 61. The district court instructed the second commission that its chairman was an "experienced attorney," and that "he should make a determination as to the admissibility or inadmissibility of any evidence where such questions arise." Instruction 3, *Procedure* (C.A. App. 71). There is no indication in the record that the commission wrongly deemed the prior award to be admissible evidence of fair value, or that the commission considered the prior award at all in making its own independent

determination. Not once did the commission mention the findings of the first commission, nor did it advert to those findings in its detailed final report. And, significantly, the award of the second commission exceeded that of its predecessor by more than $130,000.[3]

Finally, as the government pointed out in its response to petitioner's request for a cautionary instruction, C.A. App. 95-96, the instruction proffered by petitioner may have increased the probability that the commissioners would be influenced by the prior award, because the proposed instruction placed additional emphasis on the first commission's findings. The instruction proffered was, moreover, drafted in a manner that would have tended to induce the commissioners to reject any award near or below the amount of the previous award. C.A. App. 94, 96.

2. Petitioner renews his contention (Pet. 16-17) that the district court erred in preventing him from deposing William Bowen or calling Bowen as a rebuttal witness. The court of appeals did not rule upon the procedural propriety of the district court's decision, because it concluded that even if the district court erred in making that decision *ex parte*, the error was harmless. As the court explained (Pet. App. 16a), petitioner subpoenaed Bowen after the close of discovery, and after each party had already rested its case in chief. Under those circumstances, the district court correctly ruled that Bowen could

---

[3] The order's reference to the prior award was also harmless because, as the district court noted, the dollar amount of the prior award was a matter of public record, having been disclosed in the Fourth Circuit's 1990 opinion. See *United States* v. *Werner*, 916 F.2d 176.

no longer be deposed and could not be called by petitioner to testify as to the value of the property. The court's error in making that determination *ex parte*, if error it was, had no effect on the outcome of the proceedings.

3. None of petitioner's various challenges to the instructions given the commission has merit, and none raises an issue meriting further review.

a. Petitioner argues (Pet. 6-7, 12-14) that the district court erred in refusing his request that it give an instruction on the valuation of unique property by the "bands of value" method, and that the court's refusal to give petitioner's proffered instruction caused the commission wrongly to reject the testimony of his expert, William Malcolm. An instruction based on the so-called "bands of value" theory, however, would have violated the principle—commonly referred to as the "unit rule"—that property is to be valued as a whole, with its constituent parts considered only for the purpose of determining how they enhance (or diminish) that value of the whole, with care being exercised to avoid so-called "cumulative" appraisals. See *United States* v. *91.90 Acres of Land* (*Walsh Refractories*), 586 F.2d 79, 87 (8th Cir. 1978), cert. denied, 441 U.S. 944 (1979); *Cade* v. *United States*, 213 F.2d 138, 142 (4th Cir. 1954); *United States* v. *Meyer*, 113 F.2d 387, 397 (7th Cir.), cert. denied, 311 U.S. 706 (1940); *Morton Butler Timber Co.* v. *United States*, 91 F.2d 884, 890-891 (6th Cir. 1937).[4]

---

[4] Accordingly, the district court in this case was correct in instructing the commission as follows:

> You are to consider the value of the land as a whole, as a unit. While in making your award you should consider all

Petitioner's expert witness, Malcolm, arrived at his value assessment by adding together the supposed values of individual components of a resort based on the values of those components at existing resorts. Gov't C.A. Br. 10. Although the commission did not explain in detail why it found Malcolm's appraisal methodology inconsistent with the district court's instructions, Pet. App. 50a, the commission correctly declined to rely on Malcolm's valuation. First, instead of assessing the value of an entire ski resort with the specified components, as he should have done, Malcolm simply assumed that individual components, such as condominiums, could be placed throughout the property, and that the values of the individual components could be added to determine the value of the tract as a whole. Gov't C.A. Br. 10. Second, Malcolm conceded on cross-examination certain obvious and critical weaknesses in his appraisal methodology: He had not used a comparable sales approach to value petitioner's property as a ski resort; he recognized that there are no ski areas further south than petitioner's site with as low a vertical drop; and his appraisal figures were based on information derived from land sold at existing ski facilities, even though petitioner's land was as yet undeveloped. *Id.* at 11.

> elements of value, such as farming value, if any, timber value, if any, or mineral value, if any, you cannot separately value each of these elements and aggregate them to reach the value of the entire tract. This is true because *these factors of value do not exist independently of each other and cannot be realized at the same time.*

Instruction 4, *Just Compensation* (C.A. App. 78) (emphasis added).

At any rate, even if Malcolm's valuation method had been accepted by the commission, the commission would nonetheless have rejected Malcolm's estimate of fair value, because the commission rejected his premise that the tract's highest and best use was as a ski resort. Pet. App. 58a.

b. Contrary to petitioner's contention (Pet. 14), there was no need for a specific instruction respecting petitioner's competency to testify as to the value of the property. The district court instructed the commission generally that a witness should be permitted to "testify as to an opinion of value he has by reason of investigation, training, experience, or other qualifications," Instruction 2, *Weighing the Evidence* (C.A. App. 73), and petitioner was in fact permitted to testify both on direct and in rebuttal as to his opinion of the best and highest use, and value, of the property, Pet. App. 48a, 56a. The court instructed the commission, however, that the weight to be given opinion testimony would vary depending on "the manner and demeanor of the witness, the bias or lack of bias, the grounds upon which the witness based his opinion, his experience and knowledge of the matters about which he is testifying * * *, and the reasonableness or unreasonableness of his opinion." Instruction 2, *supra*. After hearing petitioner's testimony, the commission rejected his position that the best and highest use of the property was as a ski resort. Pet. App. 58a. While petitioner disagrees with the commission's factual determination, he has not identified any defect in the district court's instructions.

c. Finally, notwithstanding petitioner's contrary assertion (Pet. 14), no separate instruction on severance damages was called for in this case. The

district court gave the following instruction regarding valuation of a partial taking:

> You may have instances in which the Government has taken a part only of a larger tract, leaving the remainder to the landowner. In such a situation, the taking may not affect the value of the remainder in any way [or] it may either damage or benefit the remainder, depending upon the circumstances of the case. In any such situation the measure of just compensation is the same, that is, the difference between the fair and reasonable market value of the entire tract of land immediately before the taking and the fair and reasonable market value of the portion that remains after the taking.

Instruction 7, *Just Compensation* (C.A. App. 79). As the court of appeals recognized, Pet. App. 20a, the "before and after" method of valuation described by the district court adequately takes severance damages into account. See *United States* v. *2.33 Acres of Land*, 704 F.2d 728, 730 (4th Cir. 1983); *United States* v. *91.90 Acres of Land*, 586 F.2d at 86.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

JOHN A. BRYSON
JACQUES B. GELIN
Attorneys

APRIL 1995